CEO 78-86 -- November 15, 1978

CONFLICT OF INTEREST

BOARD OF ADJUSTMENT MEMBER OCCASIONALLY REPRESENTING CLIENTS BEFORE BOARD OF ADJUSTMENT

To: Charles Vitunac, Palm Beach County Assistant County Attorney, West Palm Beach

Prepared by: Phil Claypool

SUMMARY:

The Code of Ethics prohibits a public officer from having 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, and also prohibits such employment or contractual relationships as would impede the full and faithful discharge of one's public duties. Section 112.313(7)(a), F. S. 1977. In a previous advisory opinion, CEO 77-126, it was found a prohibited conflict of interest was created where a municipal planning board member privately had represented clients before the board on 11 of the 26 issues coming before the board, under the rationale that "undertaking to represent a client before a board of which one is a member necessarily interferes with the full and faithful discharge of one's public duties . . . ." Where a public officer undertakes to represent another person's interests before his own board, the board member has the advantage of knowing intimately board procedures as well as the particular interests, views, and voting records of its members. Also, the public officer's independence and impartiality are jeopardized, and such representation presents the appearance of public office being used for private gain. See s. 112.311, F. S. Accordingly, a prohibited conflict of interest would be created were a member of a county board of adjustment, or any member of his professional firm, to represent a client before the board.

QUESTION:

Does a prohibited conflict of interest exist when a member of a county board of adjustment occasionally represents in his private capacity a client before the board of adjustment?

Your question is answered in the affirmative.

In your letter of inquiry you advise that Mr. Jan Wolfe is a member of the Palm Beach County Board of Adjustment who is contemplating representing a client, through his land-planning and development consulting firm, before the board of adjustment. Also, you reference a previous advisory opinion of this commission, CEO 77-126, which found that a prohibited conflict of interest was created when a municipal planning board member privately

had represented clients before that board on 11 of the 26 issues coming before the board, and you question whether more occasional representations would be prohibited.

The Code of Ethics for Public Officers and Employees prohibits a public officer from having 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, and also prohibits such employment or contractual relationships as would impede the full and faithful discharge of one's public duties. Section 112.313(7)(a), F. S. 1977. Conversely, the Code of Ethics also provides:

> Construction -- It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of this state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his duties to the state or the county, city, or other political subdivision of the state involved. [Section 112.316, F. S. 1977.]

In interpreting these two provisions of the Code of Ethics in CEO 77-126, we advised that

> undertaking to represent a client before a board on which one is a member necessarily interferes with the full and faithful discharge of one's public duties and, particularly in the instant case where such representations are frequent, presents a continuing or frequently recurring conflict in violation of the second clause of s. 112.313(7)(a), above.

In other words, any representation of a client for compensation before a board of which one is a member impedes the full and faithful discharge of one's public duties, in violation of s. 112.313(7)(a). When one is employed to make several such representations, a frequently recurring conflict of interest arises, in further violation of that section.

We previously have advised that the Code of Ethics does not prohibit a public officer's appearing in his own behalf before any agency of government, including his own agency. See CEO 77-119. However, a different situation is presented when, as a part of his profession or occupation, an individual undertakes to represent another person's interests before his own board. When that occurs, the board member has the advantage of knowing intimately board procedures as well as the particular interests, views, and voting records of its members, and he can tailor his representation accordingly. In addition, the public officer's independence and impartiality are jeopardized. Finally, the appearance of public office being used for private gain undermines the confidence of people in their government. Such a situation would be similar to a member of the Commission on Ethics being retained to represent one who is charged with a violation of the Code of Ethics, or to a legislator acting as a paid lobbyist before the Legislature. See s. 112.311, F. S., in this regard.

We do not feel that this conflict of interest could be mitigated or avoided by having another member or an employee of the public officer's professional firm represent the client before his board. The same conflict of interest and appearance of conflict of interest would be

involved in this type of representation, as well as the same direct private gain to the public officer.

Accordingly, we find that a prohibited conflict of interest would be created were a member of a county board of adjustment to represent a private client before that board.

CEO 80-19 -- March 20, 1980

CONFLICT OF INTEREST

SCHOOL TEACHER OWNER OF TRAVEL AGENCY ARRANGING TRIP FOR STUDENTS THROUGH PRIVATE ORGANIZATION OF PARENTS

To: (Name withheld at the person's request.)

Prepared by: Phil Claypool

SUMMARY:

Reference is made to CEO's 75-196 (question 2) and 79-60, in which it was found that neither s. 112.313(3) nor (7), F. S., would be violated were a school teacher or school board member to sell goods or services to school- related organizations which receive no financial support from the school board or from individual schools and which are not directly controlled by the school board or by individual schools. Similarly, no prohibited conflict of interest is deemed to be created when an elementary school teacher and owner of a travel agency arranges a trip for students within his school district through a private organization of parents of gifted children, inasmuch as the organization neither receives financial support from the schools nor is directly controlled by the schools. It is observed, however, that the use of his position as a teacher to solicit business for his travel agency or to acquire information beneficial to his travel business potentially would be in violation of s. 112.313(6) or (8).

QUESTION:

Would a prohibited conflict of interest exist were I, an elementary school teacher and owner of a travel agency, to arrange a trip for students within my school district through a private organization of parents?

Your question is answered in the negative.

In your letter of inquiry, you advise that you are a teacher of gifted students at an elementary school and that you own a travel agency. In addition, you advise that, in the past, you were asked by a countywide nonprofit organization of parents of gifted children to arrange a trip to Mexico for interested gifted students from the county. You question whether your activities as an agent contracted to supply services to an organization separate from the school system would be prohibited by the Code of Ethics for Public Officers and Employees.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY. -- No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any

realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or his 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 his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. 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.

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. [Section 112.313(3) and (7)(a), F. S.]

In previous advisory opinions, we have found that these provisions would not prohibit a school teacher or a school board member from selling goods or services to school-related organizations which receive no financial support from the school board or from individual schools and which are not directly controlled by the school board or by individual schools. See CEO 79-60 and CEO 75-196 (Question 2). As it appears that the particular organization of parents of gifted students involved here is not receiving financial support from the schools and is not directly controlled by the schools, the situation you contemplate would not be prohibited by the Code of Ethics.

However, the Code of Ethics also provides:

DISCLOSURE OR USE OF CERTAIN INFORMATION. -- No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), F. S.]

> 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), F. S.]

The term "corruptly" is defined to mean

> . . . 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 public duties. [Section 112.312(7), F. S.]

Because these provisions require a determination of intent, we prefer not to render an advisory opinion as to their applicability. However, we do wish to observe that the use of your position as teacher to solicit business for your travel agency or to acquire information beneficial to your travel business presents at least the appearance of a possible violation of s. 112.313(6), above. For this reason, we would advise that you be extremely careful to avoid using your position in any manner in connection with arranging travel for gifted students.

Accordingly, we find that, subject to the caveat mentioned above, no prohibited conflict of interest would be created were you, an elementary school teacher and owner of a travel agency, to arrange a trip for students within your school district through a private organization of parents. Please be advised that we have no authority to interpret the Code of Ethics of the Education Profession or any school board policies or rules which may be in effect within your district and which may apply to your situation.

CEO 80-35 -- May 21, 1980

CONFLICT OF INTEREST

AREA ASSISTANT SUPERINTENDENT OF SCHOOL DISTRICT AND SCHOOL PRINCIPAL OWNERS OF COMPANY DOING BUSINESS WITH SCHOOLS AND SCHOOL RELATED PERSONS AND ORGANIZATIONS

To: *Alvin G. White, Area Assistant Superintendent, Duval County School Board, Jacksonville*

Prepared by: Phil Claypool

SUMMARY:

Employees of a school district are prohibited by s. 112.313(3), F. S., from being owners of a company selling any goods to the district school board or to individual schools within the district. However, s. 112.313(12) contains several exemptions from the strict application of this prohibition, including, in subsection (b), one relating to competitive bidding. Unless the requirements of that section are complied with, a prohibited conflict of interest would be created were an athletic supply company owned by a high school principal and assistant superintendent of a school district to sell sporting goods or physical education supplies to the school board or to individual schools within the district.

No provision of the Code of Ethics would prohibit sales by the subject athletic supply company to students or teachers as private individuals, although attention is directed to s. 112.313(8), relating to the use of privileged information, and subsection (6), regarding misuse of public position for private gain. It is noted that both employees hold positions of high responsibility and authority within the school district and therefore should be extremely careful to avoid both the use of position and the appearance of such use in connection with sales of athletic supplies to individual customers who may be students or teachers in schools within the district.

Sales by the company to school-related organizations would not be prohibited by the Code of Ethics so long as the organizations do not receive financial assistance from and are not directly controlled by the school board or individual schools within the district.

QUESTIONS:

1. Would a prohibited conflict of interest be created were an athletic supply company owned by me, an area assistant superintendent of a school district, and by a high school principal within the district to sell sporting goods

or physical education supplies to the school board or to individual schools within the district?

2. Would a prohibited conflict of interest be created were an athletic supply company owned by me, an area assistant superintendent of a school district, and by a high school principal within the district to sell athletic supplies to students or teachers as private individuals?

3. Would a prohibited conflict of interest be created were a company owned by me, an area assistant superintendent of a school district, and a high school principal to sell athletic supplies to school-related organizations of parents?

Question 1 is answered in the affirmative, with the possible exception noted later in this opinion.

In your letter of inquiry you advise that you are employed by the Duval County School Board as an area assistant superintendent. You also advise that you own an athletic supply company together with Mr. Jimmie Johnson, who is employed as a senior high school principal within the district. You also advise that each of you is an officer in the corporation. You question whether your company may sell supplies to individual public schools or to the district school board.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY. -- No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or his 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 his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. 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.
>
> [Section 112.313(3), F. S.]

This provision prohibits an employee of a school district from selling any goods to the district school board or to individual schools within the district. See CEO 77-125 (question 2), in which we found that this provision would prohibit a director of curriculum for a district school board from owning an athletic supply company doing business with the school board or with

individual schools within the district. However, as noted in that opinion, there are several exemptions from the strict application of this prohibition. Of these possible exemptions, the one most likely to be applicable provides that s. 112.313(3) does not apply when:

> The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder and:
>
> 1. The official or his spouse or child has in no way participated in the determination of the bid specifications or the determination of the lowest or best bidder;
>
> 2. The official or his spouse or child has in no way used or attempted to use his influence to persuade the agency or any personnel thereof to enter such a contract other than by the mere submission of the bid; and
>
> 3. The official, prior to or at the time of the submission of the bid, has filed a statement with the Department of State, if he is a state officer or employee, or with the Clerk of the Circuit Court of the county in which the agency has its principal office, if he is an officer or employee of a political subdivision, disclosing his, or his spouse's or child's, interest and the nature of the intended business. [Section 112.313(12)(b), F. S.]

Please note that we have promulgated CE form 3A for use in making the disclosure required by subsection (3), above. This form is available at the office of the clerk of the circuit court.

Accordingly, unless the sale is made by sealed, competitive bid and unless the other requirements of s. 112.313(12)(b), above, are complied with, we find that a prohibited conflict of interest would be created were an athletic supply company owned by you and a high school principal to sell sporting goods or physical education supplies to the school board or to individual schools within the school district.

Question 2 is answered in the negative.

We have examined the Code of Ethics for Public Officers and Employees and find no provision which would prohibit this situation. However, the Code of Ethics provides:

> DISCLOSURE OR USE OF CERTAIN INFORMATION. -- No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), F. S.]
>
> 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), F. S.]

We note that both you and the coowner of the athletic supply company hold positions of high responsibility and authority within the school district. For this reason, we would advise that you be extremely careful to avoid both the use of your position and the appearance of using your position in any manner in connection with sales of athletic supplies to individual customers who may be students in public schools or teachers employed by the school district. For example, we suggest that you be particularly cautious about personal solicitations of students and personnel of the school system while on school property.

In your letter of inquiry you pose a third question whether the Code of Ethics would permit your company to sell to customers who represent parental organizations such as P.T.A.'s, athletic booster clubs, or band parents clubs. In response to this question we refer you to CEO's 80-19, 79-60, and 75-196. In each of these opinions we have advised that school district personnel privately may sell goods or services to school-related organizations which do not receive financial assistance from and which are not directly controlled by the school board or individual schools within the district. As your letter of inquiry does not indicate whether these organizations receive such assistance or are controlled by the school board or by individual schools, we merely note that no prohibited conflict of interest would be created were your company to sell to school-related organizations so long as the organizations do not receive financial assistance from and are not directly controlled by the school board or individual schools within the district. Again, however, we caution against misuse of public position in this regard or the appearance of such misuse.

CEO 82-13 -- March 4, 1982

VOTING CONFLICT OF INTEREST

WATER CONTROL DISTRICT BOARD MEMBER EMPLOYED BY CORPORATION DONATING LAND TO DISTRICT

To: Mr. Madison F. Pacetti, Attorney for East County Water Control District

SUMMARY:

No prohibited conflict of interest would exist were a Water Control District to accept a donation of land, with the possibility of reverter, from a corporate land owner which employs a member of the District Board. Section 112.313(7), Florida Statutes, prohibits a public officer from being employed by a business entity which is doing business with his agency. Here, however, the employer is not "doing business" with the District by virtue of the donation of property.

A voting conflict of interest would be created under Section 112.3143, Florida Statutes, if the Water Control District Board member were to vote to accept the donation of land, with the possibility of reverter, from the corporate land owner which employs him. Under the statute, the Board member would have a private interest in the matter since it involves his employer. In addition, his employer would stand to specially benefit by the Board's acceptance of the donation, since the employer's taxes will be reduced while retaining the right to reacquire the property without cost in the future under the reverter clause.

QUESTION 1:

Would a prohibited conflict of interest exist were a county water control district to accept a donation of land, with the possibility of reverter, from a corporate landowner which employs a member of the district board?

This question is answered in the negative.

In your letter of inquiry you advise that Mr. Garrison T. Long is a member of the Board of Supervisors of the East County Water Control District, a special taxing district created by Chapter 63-1549, Laws of Florida, for the purposes of water control and drainage, among others. The District includes approximately 50,000 acres in Lee and Hendry County, you advise. Among the water control projects with which the District is involved, there is one project in connection with which approximately 400 acres have been required by various environmental agencies such as the South Florida Water Management District and the Department of Environmental Regulation to be preserved from use for water quality and other purposes. You advise that the District has been offered this property without cost by the corporate landowner, by a deed which contains a reverter provision allowing the former landowner to take title to the property at no cost by the exercise of a written option at any time after five years from the deed's recording.

The Board has unanimously agreed to accept the land subject to the reverter, you advise, as it is beneficial for its water control and water quality. It is proposed that the District will enter into an arrangement with the State Department of Forestry to use the land for environmental purposes. If the District obtains title to the property as a governmental agency, the property will be exempt from all county and ad valorem taxes, as well as the District's special assessment. Thus, this will increase the tax burden on other property owners. Finally, you advise that Mr. Long is an employee of the corporate landowner.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> 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. [Section 112.313(7)(a), F.S. (1981).]

This provision prohibits a public officer from being employed by a business entity which is doing business with his agency. However, we do not find that the board member's employer is doing business with the Water Control District. In our view, the phrase "doing business" contemplates an exchange of consideration, such as money, property, or services, rather than a donation of property as proposed in this instance. Nor do we find a prohibited conflict of interest under any of the other prohibitions contained in Section 112.313(7)(a), under the circumstances you have described.

Accordingly, we find that no prohibited conflict of interest would exist were the Water Control District to accept the donation of land from the corporate landowner which employs the subject District Board member. The fact that the transfer of the land to the District would shift the tax burden to other lands within the District does not present any issue under the Code of Ethics.

QUESTION 2:

> Would a voting conflict exist where a water control district board member votes to accept a donation of land, with the possibility of reverter, from the corporate landowner which employs him?

This question is answered in the affirmative.

With respect to voting conflicts of interest, the Code of Ethics provides in relevant part:

> Voting conflicts. -- No public officer shall be prohibited from voting in his official capacity on any matter. However, any

> public officer voting in his official capacity upon any measure in which he has a personal, private, or professional interest and which inures to his special private gain or the special gain of any principal by whom he is retained shall, within 15 days after the vote occurs, disclose the nature of his 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, F.S. (1981).]

Under this provision, a public officer must file a Memorandum of Voting Conflict (CE Form 4) if he votes upon a measure in which he has a private interest and which inures to the special gain of a principal by whom he is retained. We are of the opinion that a public officer has a private interest in a matter coming before his board which involves his employer. In addition, it appears that the corporate landowner stands to specially benefit by the Board's action in accepting the donation of land, since the landowner's taxes will be reduced while it still will have the right to reacquire the property without cost in the future.

Accordingly, we find that the subject Board member should file a Memorandum of Voting Conflict in accordance with Section 112.3143, Florida Statutes, following his vote to accept the transfer of the subject property.

CEO 82-28 -- May 20, 1982

CONFLICT OF INTEREST

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES EMPLOYEE ENGAGING IN CONSULTATION BUSINESS

To: *Mr. Steven W. Huss, Attorney, Health and Technical Support Services, Department of Health and Rehabilitative Services*

SUMMARY:

No prohibited conflict of interest was created where a Mental Health Program Analyst Supervisor with the Department of Health and Rehabilitative Services was an officer and shareholder in a corporation formed to provide consulting services relating to the development of educational systems. Although the employee was the contract manager for a project which developed an education curriculum for training staff to assist in the treatment and rehabilitation of mental health patients, the materials developed under that contract were not used by the consulting corporation. Nor was a continuing or frequently recurring conflict of interest created because, as contract manager, the employee had no supervisory relationship with any person funded under the contract.

Regarding consultation performed by the employee for the State of Virginia, it does not appear that the employee misused his public position for his benefit, although no final conclusion could be reached in an advisory opinion.

QUESTION 1:

Was a prohibited conflict of interest created where a Mental Health Program Analyst Supervisor with the Department of Health and Rehabilitative Services was an officer and shareholder in a corporation formed to provide consulting services relating to the development of educational systems?

This question is answered in the negative.

In your letter of inquiry you advise that Dr. Robert C. Ashburn is a Mental Health Program Analyst Supervisor in the Mental Health Manpower Development Program of the Program Planning and Development, Mental Health Program Office, Department of Health and Rehabilitative Services. In this position, he is responsible for supervising mental health manpower training program development. In addition, he served as contract manager of a unit treatment and rehabilitation program contract between the Department and a community college, under which the community college developed an educational program for training staff at State hospitals to assist in the treatment and rehabilitation of mental health patients through classes given for credit at various community colleges.

You also advise that the subject employee together with two other individuals formed and was an officer and shareholder of a corporation which was intended to provide consultation services in the development of educational systems. The other individuals involved in the corporation were the president of the community college which had contracted to develop the unit treatment and rehabilitation curriculum and the project manager hired by the community college to perform the contract work. During the time the subject employee owned his interest in the corporation, the corporation submitted a proposal to the State of Virginia Department of Mental Health and Mental Retardation to develop curriculum materials for mental health and mental retardation staff and submitted a draft concept paper to the Florida Department of Education; neither of these proposals was accepted. The materials developed by the community college pursuant to the contract managed by the subject employee were not provided by the corporation because differences in organizational structures and program needs made those materials inappropriate.

The Code of Ethics for Public Officers and Employees does not prohibit a public employee from having any private economic interests whatsoever. Rather, the Code of Ethics recognizes that public servants should be permitted to acquire and retain private economic interests except when conflicts of interest cannot be avoided. Section 112.311(2), Florida Statutes. In accordance with this public policy, the Code of Ethics places certain restrictions upon the private economic activities of a public employee. For example, under Section 112.313(3), Florida Statutes, a public employee cannot transact business with his own agency. Nor is a public employee permitted to contract with or be employed by a business entity which is doing business with, or is subject to the regulation of, his agency. Section 112.313(7), Florida Statutes. Neither of these provisions appears to be applicable under the circumstances presented to us.

In addition, the Code of Ethics provides:

> DISCLOSURE OR USE OF CERTAIN INFORMATION. -- No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), F. S.]

In a previous opinion, CEO 80-21, we advised that this provision would prohibit a public employee from offering his services as a consultant relating to dispute resolution alternatives, where he had been employed by the State to direct a project on dispute resolution alternatives. There, the information which he would have been imparting was gained by reason of his research, preparation, and experience while an employee. Similarly, in CEO 81-54, we advised that this provision would prohibit an employee of the Department of Health and Rehabilitative Services from forming a consultation corporation to provide a training program developed by him for the Department.

The situation of the subject employee and his corporation, however, differs from the situations presented in these earlier opinions. The corporation apparently did not intend to sell materials or information developed under the contract between the Department and the community college as part of any educational system which it would have developed. Rather, the corporation would have been utilizing the expertise of its members in the development of programs which would differ because of the particular needs of the states or public agencies involved.

Section 112.313(7)(a), Florida Statutes, also prohibits a public employee from having any 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. As used in this provision, the phrase "conflict of interest" is defined to mean "a situation where regard for a private interest tends to lead to disregard of a public duty or interest." Section 112.312(6), Florida Statutes.

In our view the subject employee had a contractual relationship with each of the other shareholders of the corporation. A corporate charter is in the nature of a contract between the corporation and its stockholders, and also between the stockholders themselves. See 8 Fla. Jur. 2d Business Relationships, Section 56; 18 C.J.S. Corporations, Section 71; and 18 Am. Jur. 2d Corporations, Section 85.

The issue of whether a prohibited conflict of interest is created by virtue of a contractual relationship between a public employee and a subordinate employee has not been raised before. We are of the opinion that generally no continuing or frequently recurring conflict of interest would arise from such a relationship. It is possible that where a public employee has an ongoing business relationship with a subordinate, that private business relationship and the employee's interests in keeping that relationship harmonious, productive, and profitable would impede the employee's duty of impartially evaluating the subordinate's job performance and would lead to a frequently recurring conflict between those interests.

However, under the circumstances you have presented, it does not appear that such a substantial conflict of interest is present. The subject employee did not select the project director who was responsible for the performance of the contract by the community college. In addition, the project director's performance under the contract was reviewed through a curriculum committee established to review all of the materials developed in the program. As contract manager, the subject employee had no supervisory relationship with any person funded under the unit treatment and rehabilitation contract.

Accordingly, under the circumstances you have presented, we find that no prohibited conflict of interest existed where the subject employee was an officer and a shareholder in this particular consulting corporation.

QUESTION 2:

> Was the Code of Ethics for Public Officers and Employees violated where the subject Mental Health Program Analyst Supervisor provided assistance to the State of Virginia in the area of mental health and mental retardation at the expense of that State?

In your letter of inquiry you advise that the subject employee made three trips to the State of Virginia prior to the formation of the consulting corporation. The first trip was made as a staff member of the State Manpower Development Program, with the subject employee traveling on State time and his travel and expenses being paid by a federal grant. At that time, the subject employee shared information on the State's unit treatment and rehabilitation development efforts, and the State of Virginia shared material it had developed. The subject employee received no payment of any kind from the State of Virginia.

The second trip was made at the request of the State of Virginia for the purpose of helping them select a training director. This trip was made while on annual leave, and the State of Virginia did pay the employee's expenses and one day's consulting fee.

The third trip also was made at the request of the State of Virginia, which wanted the subject employee to review its mental health and mental retardation facilities and to provide the State with information on how its system could be improved. The subject employee was on annual leave at that time, and expenses for his trip were paid by the State of Virginia, although no consulting fee was charged or paid. During this trip, the possibility of the employee's working with Virginia to develop training materials for mental health and mental retardation staff was discussed. At the conclusion of this trip, Virginia asked whether the subject employee would be interested in submitting a proposal to develop a human services paraprofessional model curriculum for that State. The proposal subsequently was made by the consulting corporation.

The Code of Ethics provides in relevant part:

> 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), F. S.]

The term "corruptly" is defined to mean

> 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 public duties. [Section 112.312(7), F. S.]

As we have observed in previous opinions, this statute requires a determination of intent which is extremely difficult to make while rendering an advisory opinion, since intent is to be determined from an examination of all relevant circumstances. We are able to do this when a complaint has been filed concerning a given situation on the basis of evidence presented through investigation and hearing, but in rendering an advisory opinion we are handicapped by a lack of access to information concerning all the circumstances of the situation, as well as information concerning the credibility of the individuals involved.

For these reasons we cannot reach a final conclusion as to whether the subject employee's actions constituted a misuse of his public position in violation of this statute. However, it does not appear that, under the circumstances presented, the subject employee used his position in providing assistance to the State of Virginia, as he was traveling while on annual leave. Nor do the circumstances you have presented suggest that the subject employee utilized his public position to obtain consulting work with the State of Virginia.

CEO 82-85 -- October 29, 1982

CONFLICT OF INTEREST

SCHOOL DISTRICT EMPLOYEE PHOTOGRAPHING SCHOOL FUNCTIONS

To: Mr. Robert D. Buffmire, Director of Food Service, Brevard County School District

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(3), Florida Statutes, were the director of food services for a school district to serve as the photographer at school dances or for other school functions unless the aggregate amount of purchases from the school district and schools within the district does not exceed $500 per calendar or fiscal year [Section 112.313(12)(f), Florida Statutes], or unless his services are paid for directly by the students or other individuals involved from private funds.

QUESTION:

Would a prohibited conflict of interest be created were you, the director of food service for a school district, to serve as the photographer at school dances or for other school functions?

In your letter of inquiry you advise that you are employed as the Director of Food Service for the Brevard County School District and that you also are a professional photographer. You question whether you may serve as the photographer at local high school dances or for other school functions, such as athletic team pictures.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> DOING BUSINESS WITH ONE'S AGENCY. -- No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or his 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 his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. 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.
[Section 112.313(3), Florida Statutes (1981).]

This provision prohibits an employee of a School District from acting in a private capacity to sell any goods or services to the School District or any school within the District. See CEO 77-42, CEO 77-125, CEO 79-83, and CEO 80-35. Therefore, you are prohibited from selling your services as a photographer to the School District and to schools within the District, which would include purchases of your services from internal accounts at those schools.

However, as noted in the above opinions, there are a number of exemptions to the strict application of this prohibition. Of these exemptions, the one most likely to be applicable provides that Section 112.313(3) does not apply when

[t]he total amount of the subject transaction does not exceed $500. [Section 112.313(12)(f), Florida Statutes (1981).]

In CEO 77-182, we advised that this prohibition would exempt a total of no more than $500 worth of business in any given twelve-month period.

Section 112.313(3) applies to the sale of goods or services to a public body. Therefore, where your services as a photographer are paid for directly by the students at a dance or by other individuals involved, and not from public funds such as internal accounts of the school, Section 112.313(3) would not apply.

Accordingly, we find a prohibited conflict of interest would be created were you to serve as the photographer at school dances or for other school functions unless the aggregated amount of purchases from the School District and schools within the District does not exceed $500 per calendar or fiscal year, or unless your services are paid for directly by the students or other individuals involved from private funds.

CEO 84-111 -- November 29, 1984

CONFLICT OF INTEREST

CITY POLICE OFFICERS INVOLVED IN POLYGRAPH BUSINESS

To: Mr. Schuyler M. Meyer, III, Chief of Police, Pompano Beach Police Department

SUMMARY:

No prohibited conflict of interest exists where the captain, a lieutenant, a sergeant, and a detective of the detective bureau of a city police department work together as independent contractors doing polygraph examinations due to the limited authority the officers have over subordinates. CEO's 82-6, 82-28 and 82-36 are referenced.

QUESTION:

Does a prohibited conflict of interest exist where the captain, a lieutenant, a sergeant and a detective of the detective bureau of a city police department work together as independent contractors doing polygraph examinations?

Your question is answered in the negative.

In your letter of inquiry and in a telephone conversation with our staff, you have advised that a police detective with the Pompano Beach Department, who does polygraph work for the Police Department, also owns a private polygraph company. You also have advised that the captain, a lieutenant, and a sergeant of the Detective Bureau also do polygraph examinations, sharing facilities and equipment as independent contractors with the detective. Under their agreement they pay the detective a fee based on their activities.

You also have advised that supervision in the Detective Bureau is handled through the chain of command. However, none of the officers has the authority to hire or fire any other officer. Each supervisor has the authority to discipline for minor complaints such as rudeness, but the internal affairs unit of the Police Department would handle the more serious allegations. Finally, you advise that at the present time the detective is not formally evaluated by his supervisors, since City rules provide that an employee's work is not formally evaluated after five years of service.

The Code of Ethics for Public Officers and Employees prohibits a public officer or employee from having 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." Section 112.313(7)(a), Florida Statutes (1983). Under this provision we have advised that a municipal police officer may conduct polygraph examinations within that municipality so long as a prior written waiver of confidentiality is obtained from clients in accordance with Section 493.32, Florida Statutes. See CEO 82-6 and CEO 82-36.

With respect to the private business relationship among the officers of the detective bureau, we have stated previously that we are of the opinion that generally no continuing or

frequently recurring conflict of interest would arise from a contractual relationship between a public employee and a subordinate employee. See CEO 82-28. We also stated in that opinion:

> It is possible that where a public employee has an ongoing business relationship with a subordinate, that private business relationship and the employee's interests in keeping that relationship harmonious, productive, and profitable would impede the employee's duty of impartially evaluating the subordinate's job performance and would lead to the frequently recurring conflict between those interests.

However, under the circumstances presented the officers do not evaluate the detective who owns the polygraph company and do not have the authority to hire or fire detectives.

Accordingly, we find that no prohibited conflict of interest exists by virtue of the subject officers' involvement in the polygraph business. In the event that the officers' personnel authority is changed significantly, we suggest that you seek another opinion which would take into account the change in circumstances.

CEO 89-47 -- September 14, 1989

CONFLICT OF INTEREST

COUNTY COMMISSIONER'S LAW FIRM REPRESENTING LOCAL DEVELOPER

To: (Name withheld at the person's request.)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were the law firm of a county commissioner to represent a developer in the formation of a community development district in the county, or to represent the district after its formation. Representing the developer would impede the commissioner's duty to determine if formation of the district is in the best interests of the county, although a unity of interests would be present if the county expressed support for forming the district. Once formed, the district is also subject to the regulation of the county, constituting a prohibited conflict of interest which would preclude the commissioner's firm from representing the district.

QUESTION 1:

Would a prohibited conflict of interest be created were your law firm to represent a local developer in the formation of a Community Development District, where you also serve as a County Commissioner?

Your question is answered in the affirmative, subject to the conditions indicated.

In your letter of inquiry, you advise that you are a Collier County Commissioner, having been elected in November 1988. You advise that you are also a practicing attorney and partner in the local office of a law firm. A local developer has contacted your office about representation in the formation of a community development district under Chapter 190, Florida Statutes. Because this district is contemplated to be over 1,000 acres in size, it would require a petition to be filed with the State Land and Water Adjudicatory Commission. The petition also would be submitted to any municipalities or counties which include land comprising the district. Affected counties and municipalities could conduct a public hearing regarding the petition and may adopt a resolution expressing support of or objection to the granting of the petition based on factors outlined in statute. In addition, a local public hearing must be held by a hearing officer under Chapter 120, Florida Statutes, at which the public and local governments have an opportunity to comment on the petition. The Land and Water Adjudicatory Commission considers a number of factors, including the resolutions of local governments and records of the hearings, in making a determination to grant or deny the petition. You inquire as to whether your firm may represent the developer in formation of such a district within your county.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> 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. [Section 112.313(7)(a), Florida Statutes].

This provision would prohibit you from holding a contractual relationship with the developer if he is subject to the regulation of your County, or if it would create a continuing or frequently recurring conflict between your private interests and performance of your duties as a County Commissioner or would impede the full and faithful discharge of those duties.

In order to determine whether this relationship creates a prohibited conflict of interest, we first must determine whether the developer is subject to the regulation of the County. We have advised in CEO 88-20 that ordinances of general application which do not regulate one landowner more than another do not constitute "regulation" within the meaning of this provision. We also have held that where active enforcement has been delegated to various city boards and departments, a business was not "regulated" by a city commission. In that decision, we noted that if general controls and restrictions constitute regulation, no commissioner could work or reside in the city. In re John Zerweck, Complaint No. 79-74, 2 F.A.L.R. 1097-A (1980), affirmed, Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982). Further, in CEO 87-22, we advised that where a county development authority did not prescribe methods of doing business, but rather implemented constraints on businesses in an industrial park to maintain the desirability of the park, the authority did not "regulate" those businesses.

In this case, the County has the general power to enact ordinances which would apply to the developer, as well as to other landowners or developers, and be enforced through various County boards and departments. In our view, these duties alone would not constitute "regulation" of the developer under Section 112.313(7)(a), Florida Statutes. Under Chapter 190, Florida Statutes, the County also has various permissive powers with regard to creation of the district. These include calling a public hearing, issuing a resolution opposing or supporting creation of the district, or appearing at a local hearing to be conducted by a hearing officer. While the views of the County would be considered by the Land and Water Adjudicatory Commission in its determination on the petition, the County has no mandatory duties with regard to creation of the district or any role in prescribing how the district would be formed. Rather, the duties specified in statute constitute an advisory role to the decision maker. Under these circumstances the County Commission cannot be said to "regulate" the developer in formation of the district.

The second provision of the statute to be considered is whether your contractual relationship with this developer would create a continuing or frequently recurring conflict between private interests and the performance of your duties as a County Commissioner or would impede the full and faithful discharge of those duties. The District Court of Appeal in Zerweck stated that this prohibition.

> establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation which 'tempts dishonor.' [409 So. 2d at 61.]

Also, the Code of Ethics defines "conflict" as

> a situation in which regard for a private interest tends to lead to disregard of a public duty or interest.

Interpreting this provision as defined in Zerweck along with the definition of "conflict" cited above, we must examine the nature of your public duties as a Commissioner along with the obligations of your private relationship with the developer to determine if the two are compatible.

In CEO 84-1, we advised that a developer was not regulated by the county commission where active enforcement of general ordinances had been delegated to various county boards and departments. However, we also advised that this delegation does not necessarily mean that a continuing or frequently recurring conflict could not exist or that relationships with a developer could not impede the full and faithful discharge of public duties under the second provision of Section 112.313(7)(a). We also advised in CEO 88-40 that a city council member who is a partner in a law firm should not represent clients before the city council; nor should members of his firm represent such clients. In CEO 77-126, we advised that representation of clients before one's board constituted a conflict of interest as defined in Section 112.312(6), Florida Statutes, and created a continuing or frequently recurring conflict. In CEO 78-86, we held that even where such representation occurred once, it would impede the full and faithful discharge of public duties. In other decisions, we have advised that a conflict of interest would exist where a member of a city commission represented clients against the city in other forums. See CEO's 80-12, and 82-7.

In this case your duties as a County Commissioner would involve determining whether the establishment of the community development district is in the best interests of the County, so that the County's position could be advocated in the review process at the local hearing and before the Land and Water Adjudicatory Commission. We are advised by State officials involved in the community development district review process that usually a county's concerns are important elements in a hearing officer's determination of whether to recommend that the district be established. However, your private employment dictates that you promote creation of the district, which could include lobbying the County by your firm to influence them to support the district. Also, your firm could be called upon to represent the developer at a public hearing called by the County or at the local public hearing before a hearing officer. If the County adopted a resolution opposing the creation of the district, your firm also could be faced with appearing in opposition to the County before the Governor and Cabinet.

In the circumstances you have presented, we find that your firm should not represent the developer in any hearing called by the County or before the County Commission. Your firm also should not represent the developer in any situation where the interests of the County may be opposed to those of the developer. This would include the hearings specified in Chapter 190 as well as any other proceeding where the County has not taken a position

favoring approval of the petition creating the district. This also would include any negotiations with the County preceding formal consideration of the matter by the Commission, since there may be efforts to influence the County to support the petition prior to its filing with the State. In each of these situations your private interests could potentially lead to disregard of your public duties.

However, a conflict of interest between your private interests and your public duties would be eliminated were the County to take a position in support of the creating the district. Rather, from that point on in the formation process there would be a unity of interests between the developer and the County. Our past decisions have recognized that such a commonality of interests can negate an apparent conflict. See CEO's 86-43, 84-63, and 83-35. Therefore, while a conflict would exist before the County had determined whether to support creation of the district, it would be removed by a clear expression of County support for the petition. We do not prescribe what form this expression of support must take, but a resolution or other action by a majority of the County Commission would be the most unambiguous indicator. Further, if the County Commission formally elects not to take a position on the petition the conflict of interest also would be removed because your public and private interests would no longer be incompatible. Your representation of the client would begin only after the County's decision process was completed. See CEO 85-33.

If such a measure were to come before the Commission, the question arises as to whether you may vote. The Code of Ethics provides:

> No county, municipal, or other local public officer shall vote in his official capacity upon any measure which inures to his special private gain or shall knowingly vote in his official capacity upon any measure which inures to the special gain of any principal, other than an agency as defined in s. 112.312(2), by whom he is retained. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter from which he is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his 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. However, a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356 or s. 163.357 or an officer of an independent special tax district elected on a one-acre, one-vote basis is not prohibited from voting. [Section 112.3143(3), Florida Statutes.]

Since your firm would not be retained at the time of this vote, and it would not benefit you personally other than raising the possibility your firm may acquire a new client, you would be permitted to vote on such a measure. This potential benefit is too speculative to constitute a "special gain" to you or your firm, assuming that the developer would be under no obligation to retain your firm if a favorable vote of the Commission resulted.

In some cases, we have advised that where a conflict was not substantial, the employment or contractual relationship was permissible provided that the individual abstained from voting and disclosed that relationship under Section 112.3143(3), Florida Statutes. However, in this case the conflict that would exist prior to County support of the petition could

not be addressed through voting restrictions since the vote would constitute only a small part of the conflicting activity and would occur only after lobbying and other efforts by your firm to influence the County. In addition, this conflict could not be removed by limiting representation of the developer to other members of your firm. We previously have advised that each member of a law firm has a contractual relationship with each client of that firm. Therefore, this conflict would be present whether you or a member of your firm represented the District in its formation. CEO's 80-79 and 86-37. Further, we do not have jurisdiction to advise you as to the implications of this situation under the Code of Professional Responsibility governing ethical conduct of attorneys. You may wish to contact the Florida Bar for an opinion in this regard.

Accordingly, we find that while you serve as a County Commissioner a prohibited conflict of interest would be created were you or another member of your law firm to represent a developer in creation of a Community Development District until such time as the County expressly either supports creation of this district or elects not to take a position on the creation of the district.

QUESTION 2:

> Would a prohibited conflict of interest be created were your law firm to represent a community development district after its creation, where you also serve as a county commissioner?

Your question is answered in the affirmative.

Chapter 190, Florida Statutes, provides that a county exercises local permitting and regulation over certain powers of a community development district, while other powers can only be exercised with the consent of an affected county. Also, a district can transfer services to the county, or the county can adopt an ordinance requiring a transfer and, if the district is opposed, the issue must be resolved in circuit court.

The result in this question is dictated in part by the rationale of our answer to Question 1, along with the more complex and ongoing regulatory relationship between a county and an existing community development district. As noted in our response to Question 1, we have advised that a county commissioner's authority over county employees who possess delegated enforcement authority can cause a continuing or frequently recurring conflict or impede the full and faithful discharge of public duties, even where the commission may not regulate the firm in question. See CEO 84-1. By representing the district after its creation, you would have a conflict which would impede the full and faithful discharge of your public duties. Also, there is the potential for these conflicts to occur on a continuing or frequently recurring basis due to the statutory provisions requiring interactions between the County and district. Unlike Question 1, the fact that the County may support the district on a particular issue would not be significant because of the potential for a new conflict with each interaction between the County and district. Chapter 190, Florida Statutes, requires County consent or permitting for roads, water, fire prevention, schools, waste disposal, and other services within the district, which could result in recurring instances where the interests of the County are opposed to those of the district. Although many of these responsibilities have been delegated to other County boards and departments, authority over these entities rests with the County Commission. See CEO 84-1.

In addition to this conflict under the second provision of Section 112.313(7)(a), Florida Statutes, we find that the County has ongoing regulatory duties with regard to the district. The powers granted to the County under Chapter 190 can govern the daily operations of the district as well as what functions the district is permitted to perform. In addition, ordinances enacted by the Commission, such as a transfer ordinance, would apply specifically to the district rather than being ordinances of general application, as in the Zerweck decision. Thus, you would hold a contractual relationship with the district, which would be subject to the regulation of your agency.

Accordingly, we find that a prohibited conflict of interest would be created were a member of your firm to provide representation for a community development district, where you serve as a member of the County Commission.

CEO 90-42 -- April 26, 1990

CONFLICT OF INTEREST

CITY MANAGER OWNING RENTAL REAL ESTATE WITH SUBORDINATE EMPLOYEE

To: John J. Downes, City Manager, City of Safety Harbor

SUMMARY:

No prohibited conflict of interest is created where a city manager owns rental property with a supervised employee. The business would not be regulated by or doing business with the City under Section 112.313(7)(a), Florida Statutes. In addition, under the second clause of that section, no continuing or frequently recurring conflict would be created through this relationship.

QUESTION:

Does a prohibited conflict of interest exist where you, a City Manager, own and manage rental property with a City department head whom you supervise?

Your question is answered in the negative.

In your letter of inquiry, you advise that you are the City Manager of the City of Safety Harbor. You advise that you, along with the Director of Leisure Services for the City and another individual, own three single family homes which you manage as residential rental property. You note that the Director serves at the pleasure of the City Manager but that you have only limited discretion within City guidelines regarding his salary increases and he receives standard City civil service benefits. You inquire whether the acquisition and operation of this real estate with a supervised employee would create a prohibited conflict of interest.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> 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.

The outside business you describe would not be prohibited by the first part of this provision, as the partnership is not doing business with or regulated by the City. The second part of this provision would prohibit any contractual relationship which would create a continuing or frequently recurring conflict between your private interests and your public duties or which would impede the full and faithful discharge of those duties. In CEO 82-28, we advised that generally no such conflict would arise from a contractual relationship between a public employee and a subordinate employee. However, as noted in that opinion, we can envision circumstances where the authority of the employee over his subordinate in his public capacity and the ongoing nature of a business relationship could create a situation where the employee's interest in keeping the business relationship harmonious could impact his ability to impartially evaluate the subordinate's job performance. See also CEO 84-111 and CEO 84-112.

We do not see such a conflict in roles here. Although the Director of Leisure Services serves at the pleasure of the City Manager, you have only limited discretion within City guidelines regarding his salary increases and he receives standard City civil service benefits. In addition, we note that although the business is ongoing, the scope of the activity is comparatively limited and would appear to have little potential to influence the public duties of the persons involved. In support of this conclusion, we cite Section 112.316, Florida Statutes, which provides that the Code of Ethics should not be construed to prohibit a public employee from following any pursuit which does not interfere with the full and faithful discharge of his public duties.

While we do not see an ongoing conflict under the above provision, we would point out the prohibition of Section 112.313(6), Florida Statutes, which provides:

> 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.

This provision provides protection from abuse in those situations where there is not a conflicting relationship, but yet there may be some potential for use of a public position to benefit a private interest. Application of this section would permit the suggested business relationship, while providing a safeguard for the subordinate employee and the public interest from this type of misuse. This is not to suggest that you in any way would attempt to use your position to benefit your private business, but rather only to point out that private business relationships such as you describe should not be prohibited where such safeguards exist.

Accordingly, we find that no prohibited conflict of interest would be created were you, a City Manager, to purchase and manage residential real property along with a supervised employee.

CEO 94-5 -- March 10, 1994

CONFLICT OF INTEREST

HOUSING FINANCE AUTHORITY MEMBER SHAREHOLDER IN LAW FIRM REPRESENTING FINANCIAL INSTITUTIONS AND BOND UNDERWRITERS

To: Mark Herron, Attorney at Law (Tallahassee)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were clients of a housing finance authority member's law firm to do business with the authority. The member would hold a contractual relationship with business entities doing business with his public agency, regardless of whether or not the member personally handles the clients' legal business or the clients utilize the office location of the firm from which the member practices. Under the facts of this opinion, except in a limited circumstance, no prohibited conflict of interest would be created were subsidiary or affiliate companies of the firm's clients to do business with the authority. CEO's 80-25, 80-79, 81-66, 86-37, 91-24, and 92-11 are referenced.

QUESTION 1:

Would a prohibited conflict of interest be created were financial institutions or bond underwriters who are clients of a housing finance authority member's law firm, which has offices in several Florida cities, to do business with the authority, where the clients are generated and maintained by offices of the firm other than the office from which the member practices and where the clients have no direct or indirect contact with the member or with any attorneys practicing from the member's office?

Your question is answered in the affirmative.

By your letter of inquiry, we are advised that Luis Artime recently has been appointed as a member of the Housing Finance Authority of Dade County. In addition, you advise that the Authority was created by County ordinance as a "separate public body corporate and politic" to carry out and exercise all powers and public governmental functions set forth in Part IV, Chapter 159, Florida Statutes, that Section 159.608, Florida Statutes, sets forth various powers which may be authorized by a housing finance authority, and that Section 159.612, Florida Statutes, authorizes a housing finance authority to issue bonds.

The Authority member, you advise, is a shareholder in a law firm which has offices throughout the State; he practices from the firm's Miami office. From its various offices, you advise, attorneys with the firm serve as counsel for various financial institutions. Often a financial institution represented by the firm is not the same corporate entity as the corporate entity which may be seeking business from the Authority, although, you advise, both may be

subsidiaries or affiliates of the same corporate parent. Further, you advise that attorneys in the firm serve as counsel in litigation matters for entities which act as bond underwriters and may compete for the business of the Authority, and that representation of the bond underwriters is not carried out through the Miami office of the firm.

You question whether the member would have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, were financial institutions or bond underwriters who are clients of the firm to do business with the Authority.

Section 112.313(7)(a), Florida Statutes, provides:

> 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.

In CEO 80-79, Question 1, we found that Section 112.313(7)(a) would prohibit a housing finance authority member who was a partner in a law firm from serving on the authority should any of the lending institutions which were clients of his firm to do business with the authority, adhering to the legal principle that every member of a law firm holds a contractual relationship with every client of the firm. Since the issuance of CEO 80-79, we consistently have adhered to that reasoning in various situations, including CEO 81-66 (municipal development authority member shareholder in law firm retained by municipality), CEO 86-37 (mayor member of law firm, other members of which are involved with business entity contracting with city), and CEO 92-11 (Florida Transportation Commission member "of counsel" to law firm practicing eminent domain law).

We are not prepared to abandon our precedent merely because the member's law firm has offices in various cities and because the member and the other firm attorneys practicing from his particular firm office would not be handling the affairs of firm clients doing business with the Authority. The success of the firm as well as the member's remuneration as a shareholder still in part would be derived from the firm's total business, including the portion derived from the representation of clients doing business with the Authority, and thus the member would have a private economic tie that could fetter his full and objective performance as a member of the Authority in regard to Authority matters and duties concerning clients of the firm. The same would be true whether the member held an interest in a smaller firm or whether he held an interest in a large firm which operated from one large office housing many attorneys.

Compliance with the voting conflicts law (Section 112.3143, Florida Statutes), which would include abstention from voting or participation in matters involving clients of the member's law firm, does not obviate the conflict under Section 112.313(7)(a). Nothing in Section 112.313(7)(a) indicates that compliance with Section 112.3143 creates an exemption from it application; in contrast, other specific exemptions are provided in Section 112.313(12). Moreover, we do not believe that abstention should have the effect of creating

an exemption, because an Authority member's duties are not confined to voting on or participating in matters which come before the Authority for formal consideration, because the Authority likely would deal with matters that would affect clients of the member's firm although such matters might not directly inure to the special private gain of the clients and would thus not be within the scope of the voting conflicts law, and because abstentions themselves, particularly if numerous, could create a continuing or frequently recurring conflict or impediment to the full and faithful discharge of the member's public duties.

Accordingly, we find that a prohibited conflict of interest would be created were the Authority member's law firm to represent clients which are doing business with the Authority.

QUESTION 2:

Would a prohibited conflict of interest be created were a subsidiary or affiliate corporation of a client of the firm to do business with the Authority?

Except for the circumstance involving holding companies and subsidiaries wherein the parent company serves as a holding company for only one asset (the stock of the subsidiary corporation), we have followed the rule that each company is a separate business entity for purposes of Section 112.313(7)(a). See CEO 80-25 and CEO 91-24, for example. Therefore, unless the relationships of subsidiaries or affiliates with client companies of the member's law firm fall within that limited circumstance, we find that no prohibited conflict of interest would be created under the first clause of Section 112.313(7)(a). As to the second clause of Section 112.313(7)(a), we do not find (under the circumstances) that a continuing or frequently recurring conflict, or impediment to the full and faithful discharge of public duties, would be created.

This question is answered accordingly.

CEO 03-7--June 10, 2003

CONFLICT OF INTEREST; VOTING CONFLICT

CITY COUNCIL MEMBER ATTORNEY IN LAW FIRM CLIENTS OF WHICH INTERACT WITH CITY

To: Mark Herron, Esquire (Tallahassee)

SUMMARY:

A prohibited conflict of interest would be created were clients of a city councilman's law firm to do business with the city in a variety of circumstances, inasmuch as the councilman would hold a contractual relationship with business entities doing business with his public agency contrary to Section 112.313(7)(a), Florida Statutes. However, a prohibited conflict would not be created were the firm to represent a convenience store chain that has property that is being annexed into the city, inasmuch as annexation constitutes neither "regulation" nor "doing business" under Section 112.313(7)(a). In addition, the councilman would be presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes, in a variety of situations affecting clients. Nevertheless, were the councilman's status with the firm to be that of "of counsel" (as set forth in this opinion) rather than that of a shareholder, the conflicts of interest and voting conflicts identified herein would not be created or presented. CEO's 74-8, 76-173, 77-129, 78-12, 80-79, 81-12, 81-66, 83-84, 85-14, 85-17, 85-20, 85-46, 86-9, 86-37, 87-96, 92-11, 94-5, 94-10, 94-21, 94-37, 94-41, 94-42, 95-4, 96-1, 98-11, and 03-3 are referenced.[1]

QUESTION 1:

Would a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, were the law firm of which a city council member is a shareholder to represent an engineering firm providing services to the city, where the council member does not personally provide legal services to the engineering firm and where his law firm's representation of the engineering firm does not concern its provision of services to the city but instead concerns matters not related to the city?

Your question is answered in the affirmative.

By your letter of inquiry and a subsequent letter from you to our staff, we are advised that you make inquiry in behalf of Phil Diamond, a member of the Orlando City Council and an equity shareholder in a statewide law firm. His firm, you advise, has approximately two hundred attorneys and thousands of clients; and you advise that some of its clients may interact in numerous ways with the City.[2] Regarding this question, you advise that an engineering firm has been recommended by City staff to provide engineering services to the City; that the staff's recommendation would require approval of the City Council in order for the engineering firm to

provide services to (to do business with) the City; that the Council member personally does not represent the engineering firm regarding any matter; that the Council member's firm does not represent the engineering firm in its efforts to provide engineering services to the City; but that his firm represents the engineering firm in matters not related to the City.

Section 112.313(7)(a), Florida Statutes, provides:

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

The first part of the statute prohibits a public officer (e.g., a city council member) from having or holding employment or a contractual relationship with a business entity (e.g., an engineering firm) that is doing business with the officer's public agency (e.g., a city). Since the engineering firm would be doing business with the City via its provision of services to the City, the issue for our consideration under the first part of the statute is whether the Council member would hold a contractual relationship with the engineering firm due to his law firm's representation of it, despite the fact that the Council member personally does not provide legal services to the engineering firm.

In accord with our longstanding view that shareholders of a law firm hold a contractual relationship with every client of the firm (whether or not they personally handle a particular client's legal business), we find that the Council member would hold a contractual relationship with the engineering firm, and thus find that a prohibited conflict would be created for him were the engineering firm to provide services to the City. See, inter alia, CEO 96-1 (Question 2), CEO 94-5, CEO 92-11, CEO 86-37, CEO 81-66, and CEO 80-79.[3] Further, we adhere to our view that compliance with the voting conflicts law [Section 112.3143(3)(a), Florida Statutes] does not negate a prohibited conflict under Section 112.313(7)(a). See CEO 94-5.[4] However, inasmuch as an attorney who is merely "of counsel" to a law firm is not deemed to hold a contractual relationship with every client of the firm (see CEO 96-1, Question 2), we find (under the facts presented regarding this question) that a prohibited conflict would not be created under the first part of Section 112.313(7)(a) were the Council member's connection to the law firm to be so modified.[5] Nevertheless, we stress that our answers provided to the Council member throughout the entirety of this opinion, as to both Section 112.313(7)(a) and Section 112.3143(3)(a), Florida Statutes, which are grounded in his occupying an "of counsel" status, depend on the following substance: that the Council member has no ownership interest in the law firm, that the firm exercises no control over the Council member's activities or the activities of his clients, that the firm has no access to the Council member's personal books and records, that the Council member has no access to the books and records of the firm, and that the Council member does not share in the profits of the firm.

This question is answered accordingly.

QUESTION 2:

Would the Council member be presented with a voting conflict requiring his abstention from voting and other compliance[6] with Section 112.3143(3)(a), Florida Statutes, regarding a City Council measure to approve City staff's recommendation to hire the engineering firm to provide services to the City?

Section 112.3143(3)(a), Florida Statutes, provides:

> VOTING CONFLICTS.—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.

Under the scenario of Question 1 above, this question is answered in the affirmative. Where one affected by a measure is a client of a public officer's private law practice or firm, the client is deemed to be a principal by whom the public officer is retained.[7] See, inter alia, CEO 77-129, CEO 81-12, CEO 94-5, CEO 94-41, and CEO 98-11.[8]

QUESTION 3:

Would a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, were the Council member's law firm to represent a convenience store chain that has property that is being involuntarily annexed into the City?

This question is answered in the negative because we find that annexation constitutes neither "regulation" nor "doing business" for purposes of Section 112.313(7)(a).[9]

Additionally, we are advised that the Council member's firm represents a convenience store chain that has property being involuntarily annexed into the City; that the Council member personally does not represent the chain; that his firm does not represent the chain regarding the annexation issue, but, rather, regarding matters not related to the City; and that the City Council's approval of an annexation ordinance is necessary for annexation of the property to occur.

Although previously we have not expressly found that annexation does not constitute "regulation" or "doing business" under the statute, prior decisions of ours on related topics guide our decision regarding this question. In CEO 92-11, we found that a taking (condemnation) of property by the Florida Department of Transportation (FDOT) did not constitute "doing business," thus finding that a member of the Florida Transportation Commission did not have a prohibited conflict under Section 112.313(7)(a) by virtue of his connection to a law firm practicing eminent domain law. Also, CEO 85-17,[10] CEO 85-46,[11] and CEO 87-96[12] (decisions of ours directly dealing with annexation, albeit in the context of the voting conflicts law) are deafeningly silent regarding Section 112.313(7)(a), strongly implying nonapplicability of Section 112.313(7)(a) in the annexation context. Further, in CEO 74-8, our seminal opinion construing the meaning of "subject to the regulation of," we stated, in reliance on opinions of the Attorney General, that

> [b]usiness entities 'subject to the regulation of' a state or local government agency . . . were described . . . as those businesses whose operations or modes of doing business are subject to the control or authority of such an agency.

Thus, in reliance on this construction, we determined in CEO 74-8 that a city councilman could accept employment with a major landowner within the city, reasoning that unless the operations of such company were subject to the control or authority of the city, "regulation" would not exist. Further, see CEO 76-173, in which we found that neither "regulation" nor a prohibited conflict existed in a situation in which the law firm with which a planning and zoning commission's attorney and the county attorney were affiliated represented a company in matters not related to zoning, where the company sought occasional zoning changes incidental to its operations.

QUESTION 4:

> Would the Council member be presented with a voting conflict under Section 112.3143(3)(a) regarding the annexation ordinance?

This question is answered in the affirmative[13] if the Council member is a shareholder of the law firm at the time of a vote on the ordinance and in the negative if his connection to the firm is "of counsel."See our response to Question 2 above.

QUESTION 5:

> Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member's law firm to represent a communications equipment and service provider furnishing radios and maintenance to the City's police and fire departments?

You advise that the Council member's firm represents a communications equipment and service provider recommended by City staff to provide radios and maintenance agreements for the police and fire departments; that the staff's recommendation would require approval of the Council; that at least one of the recommendations involves a purchase pursuant to the same terms and conditions as a contract entered into between the provider and a county; that the Council member personally does not represent the provider; that the Council member's

firm does not represent the provider in connection with the radios and maintenance agreements issues; but that his firm represents the provider in matters not related to the City.

This question is answered in the affirmative if the Council member is a shareholder of the firm and in the negative if his connection to the firm is "of counsel."See our response to Question 1 above.

QUESTION 6:

Would the Council member be presented with a voting conflict under Section 112.3143(3)(a) regarding a City Council measure to approve staff's recommendation to contract with the radios/maintenance provider?

This question is answered in the affirmative if the Council member is a shareholder of the law firm at the time of a vote and in the negative if his connection to the firm is "of counsel." See our responses to questions above.

QUESTION 7:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member's law firm to represent a communications equipment provider furnishing wireless telephones to City employees?

You advise that the Council member's firm represents a communications equipment provider recommended by City staff to provide wireless telephones to City employees; that the staff's recommendation would require approval of the Council; that the provider would furnish the telephones under the same terms and conditions as those applicable to the State contract concerning wireless telephones; that the Council member personally does not represent the provider; that the Council member's firm does not represent the provider in connection with the telephones issue; but that his firm represents the provider in matters not related to the City.

This question is answered in the affirmative if the Council member is a shareholder of the firm and in the negative if his connection to the firm is "of counsel." See our responses to questions above.

QUESTION 8:

Would the Council member be presented with a voting conflict under Section 112.3143(3)(a) regarding a City Council measure to approve staff's recommendation to contract with the wireless telephones provider?

This question is answered in the affirmative if the Council member is a shareholder of the law firm at the time of the vote and in the negative if his connection to the firm is "of counsel" at the time of the vote. See our responses to questions above.

QUESTION 9:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member's law firm to represent an investor-owned utility holding an easement from the City and allowing the City to temporarily use (in conjunction with an indemnification agreement) property of the utility?

You advise that the Council member's firm represents an investor-owned utility recommended by City staff to obtain an easement from the City and to obtain an indemnification agreement from the City regarding City use of utility property; that staff's recommendation would require approval of the Council; that the Council member personally does not represent the utility; that the Council member's firm does not represent the utility in connection with the easement issue or the property use/indemnification agreement issue; but that his firm represents the utility in matters not related to the City.

This question is answered in the affirmative if the Council member is a shareholder of the firm and in the negative if his connection to the firm is "of counsel." See our responses to questions above.

We find that the City and the utility would be "doing business" with each other by virtue of the scenario presented, in that a cause of action would exist if there were a breach of obligations regarding the easement or the property use/indemnification. See CEO 83-84 for a reference to our view of the meaning of "doing business with" for purposes of Section 112.313(7)(a). Also, the easement, the easement's limitation/restrictions, and/or the City's imposition of conditions on its use may constitute "regulation" of the utility (see CEO 94-21), notwithstanding likely regulation of the utility by State-level agencies.

QUESTION 10:

Would the Council member be presented with a voting conflict regarding a City Council measure to approve staff's recommendation to grant the easement or to use utility property under an indemnification agreement?

This question is answered in the affirmative if the Council member is a shareholder of the law firm and the time of the vote(s) and in the negative if his connection to the firm is "of counsel."[14] See our responses to questions above.

QUESTION 11:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member's law firm to represent a law firm providing legal services to the City?

You advise that the Council member's firm represents another law firm; that the other firm has been recommended by City staff to provide legal services to the City; that the staff's recommendation would require approval of the Council; that the Council member personally does not represent the other firm; that the Council member's firm does not represent the other firm in connection with the legal services issue before the City; but that his firm represents the other firm in matters not related to the City.

This question is answered in the affirmative if the Council member is a shareholder of his law firm and in the negative if his connection to his firm is that of "of counsel." See our responses to questions above.

QUESTION 12:

Would the Council member be presented with a voting conflict regarding a City Council measure to approve staff's recommendation to contract with the other law firm for legal services for the City?

This question is answered in the affirmative if the Council member is a shareholder of his law firm at the time of a vote and in the negative if his connection to his firm is "of counsel." See our responses to questions above.

QUESTION 13:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member's law firm to represent a uniform supplier providing uniforms to the City?

You advise that the Council member's firm represents a uniform supplier recommended by City staff to provide uniforms to the City; that staff's recommendation would require approval of the Council; that the Council member personally does not represent the supplier; that the Council member's firm does not represent the supplier in connection with the provision of uniforms issue; but that his firm represents the supplier in matters not related to the City.

This question is answered in the affirmative if the Council member is a shareholder of his firm and in the negative if his connection to the firm is "of counsel." See our responses to questions above.

QUESTION 14:

Would the Council member be presented with a voting conflict regarding a City Council measure to approve staff's recommendation to contract with the supplier?

This question is answered in the affirmative if the Council member is a shareholder of his law firm at the time of a vote and in the negative if his connection to the firm is "of counsel." See our responses to questions above.

QUESTION 15:

Would a prohibited conflict of interest be created under Section 112.313(7)(a) were the Council member personally to represent (in matters not related to the City) a property owner seeking release from provisions of a developer's agreement entered into between the City and the property owner's predecessor in interest?

You advise that the Council member provides legal services to a property owner seeking release from restrictive provisions of a developer's agreement signed between the City and a predecessor in interest of the property owner's; that release was recommended by City staff and required approval of the Council; that the Council member personally represents the property owner; but that he does not represent the owner in any dealings with the City "in [the release] matter."

This question is answered in the affirmative. The Council member would hold a contractual relationship with a business entity (the developer/property owner)[15] doing business with the City by virtue of the developer's agreement between the City and the developer/property owner.

We have found that entities and agencies are "doing business" with each other when they are party to a lease, contract, agreement or situation in which a cause of action would exist in the event of a breach (see, for example, CEO 83-84), as would appear to be the reality between the City and the property owner vis-à-vis the developer's agreement. See also CEO 78-12 in which we found that a development was doing business with an erosion prevention district board through the donation of funds for construction of a land groin.

We note that this question is somewhat ambiguous as presented in that the last part of the last sentence of paragraph "8" of your May 7 letter arguably implies that the Council member personally represents the property owner in City matters other than the developer's agreement matter. However, inasmuch as we do not view this language of your inquiry as intending to present an issue under the second clause of Section 112.313(7)(a), we do not address such an issue herein.

In addition, we find that the provision of the City's Code (Section 2.191), which you describe as prohibiting any and all communications between lobbyists for prospective vendors and Council members regarding the procurement process, would appear to be irrelevant to our decisions herein finding conflict under the first part of Section 112.313(7)(a).

QUESTION 16:

> Would the Council member be presented with a voting conflict regarding a Council measure to approve staff's recommendation to release the property owner from provisions of the developer's agreement?

This question is answered in the affirmative. The measure would inure to the special private gain or loss of the property owner (a principal by whom the Council member is retained).

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 5, 2003 and **RENDERED** this 10th day of June, 2003.

Patrick K. Neal
Chair

[1] Opinions of the Commission on Ethics cited herein are viewable on the Commission's website: www.ethics.state.fl.us

[2] Your initial letter of inquiry is dated February 21, 2003. In your subsequent letter (dated May 8, 2003), you provided eight examples of likely interaction between the City and clients of the law firm. The examples (scenarios) ground the various questions set forth in this opinion.

[3] We recognize that our finding regarding this question and previous findings of ours suggest that we have "treated lawyers differently" than other professions or occupations, such as, for example, that of an insurance agent. See CEO 94-37. However, our interpretation of the term "contractual relationship" (not defined within the Code of Ethics) is necessarily controlled by the term's meaning under the general or substantive law of contract in Florida; and as is apparent from a reading of our "insurance agent opinions" versus our "attorney opinions," and the caselaw cited therein, that Florida law distinguishes between the contractual responsibility of insurance agents versus that of attorneys in the context of their work within a corporate/business entity structure.

[4] In view of our finding that a prohibited conflict would be created under the first part of the statute were the engineering firm represented by the Council member's law firm to do business with the City, it is not necessary for us to decide whether the situation also would create a continuing or frequently recurring conflict or impediment to the full and faithful discharge of public duty under the second part of the statute.

[5] Further, if the Council member ceases to be a shareholder of the law firm and modifies to an "of counsel" status, we do not find that a prohibited conflict would be created under the second part of Section 112.313(7)(a). The facts presented do not indicate that either the Council member or the law firm would be appearing before the City regarding the engineering firm or otherwise indicate a basis of a continuing or frequently recurring conflict or impediment to the full and faithful discharge of public duty. We do not fail to note our very recent decision under the second part of the statute (CEO 03-3), involving a member of the Florida Senate's holding of an "of counsel" relationship with a law firm other members of which lobby the Legislature, but observe that it is not especially useful as a guide in resolving your local-government-based inquiries concerning the first part of the statute.

[6] In addition to abstention, the law requires stating the basis for one's abstention and requires the timely filing of a memorandum (CE Form 8B).

[7] We have made similar findings regarding other professions; see, inter alia, CEO 85-20 (engineering company), CEO 85-14 (accounting firm), and CEO 86-9 (surveying and engineering firm). We recognize that we have made arguably different findings regarding insurance agencies and insurance agents; however, the apparent differentiation is justified in that insurance agents often can be agents of insurance companies and not agents of insureds. See CEO 94-10 and CEO 81-59. Further, as discussed below, if the Council member merely was "of counsel" to the law firm, a voting conflict would not exist regarding firm clients for whom he personally does no legal work. This position apparently is based on our recognition that "retention," within the meaning of a principal (client) by whom one is retained, is essentially based in receipt of compensation or remuneration from the client, either directly or indirectly through the firm's revenue stream related to the particular client, a situation not existent in the context of an "of counsel" attorney whose compensation is not tied to affairs of particular clients of the firm.

[8] However, were the Council member to modify his connection to the firm to that of an "of counsel" relationship, he would not be subject to the voting conflicts law regarding measures affecting clients of the firm not represented by him, assuming a measure also did not affect the firm, the Council member personally, or other persons or entities standing in an enumerated relationship to the Council member under Section 112.3143(a).

[9] Also, we find that the situation described in this question does not indicate that a continuing or frequently recurring conflict or an impediment to the full and faithful discharge of public duty would be created under the second part of the statute were the Council member's firm to represent the chain. See, inter alia, CEO 76-173 and CEO 94-5, Question 2.

[10] City mayor and commissioner employed by developer petitioning for annexation of property.

[11] City commissioner employed by developer holding mortgage on property subject to annexation petition.

[12] City commissioner voting on annexation of property sold by business partner.

[13] Unless properties other than the property of the chain are subject to the votes/measures concerning annexation and the number and character (e.g., size) of the properties is such that the affect on the chain and/or its property from a vote/measure is not "special"; see, for example, CEO 95-4 and our opinions cited therein. Also, we have found that annexation causes the requisite effect (e.g., "gain") for a violation of the voting conflicts law; see, for example, CEO 85-17.

[14] We have not been presented with any indication that the utility is an "agency" within the meaning of Section 112.312(2), Florida Statutes, such that any gain or loss to the utility from a vote/measure would be exempt from the requirements of the voting conflicts law under express language of Section 112.3143(3)(a). Section 112.312(2) defines "agency" to mean

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.

[15] Our response assumes that your inquiry uses the terms "developer" and "property owner" synonymously in referring to the Council member's client.

CEO 04-17 – October 14, 2004

CONFLICT OF INTEREST

TEACHERS ENGAGED IN PRIVATE TUTORING ACTIVITIES

To: Name withheld at person's request

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a teacher to engage in tutoring activities, for a fee and on school grounds, where the teacher is prohibited from tutoring his or her own students and is subject to the same requirements for leasing the facilities as other entities. Nor would a conflict be created were the teacher to provide such tutoring at no cost to the student, or to be employed by a company which provides such tutoring services, provided the teacher does not tutor his or her own students. A teacher would be prohibited by Section 112.313(7) from tutoring, for a fee, students enrolled in his or her own class.

QUESTION 1:

Would a conflict of interest exist were the Palm Beach County School District's collective bargaining agreement revised to allow a teacher to tutor, for pay, students who attend the school at which the teacher is based (excluding students assigned to the teacher's classes), after regular hours, on school grounds?

Your question is answered in the negative.

In your letter of inquiry and additional materials supplied to this office, you advise that as Chief Counsel for the Palm Beach County School District, you have been authorized by the School Board to request our opinion as to whether a prohibited conflict of interest would be created were the collective bargaining agreement with the teachers' association amended to permit certain tutoring activities outside the teachers' in-school responsibilities.

Your first question is whether a violation would exist if the Palm Beach County School District's collective bargaining agreement were revised to allow a teacher to tutor, for pay, students who attend that teacher's school (excluding students assigned to the teacher's classes[1]), after regular hours, on school grounds. Currently, the collective bargaining agreement implicitly permits off-duty tutoring, but not on school property. You state that the proposed revision would be beneficial to students because it would make quality tutoring available for them without the hardship of finding transportation to another site. You state that "most likely, teachers' use of District property for private tutoring would be through a standard lease agreement (probably for a nominal fee as contemplated by School Board Policy 7.18)." The prohibition against tutoring students enrolled in a teacher's own classes would be ret ained under the proposed amendment.

School Board Policy 7.18 allows the use of school facilities by community and commercial organizations pursuant to certain guidelines and supervision by the School Superintendent. According to an established rate schedule, it is contemplated that teachers wishing to use a classroom for after-hours tutoring would be subject to the same requirements as other entities or organizations desiring to use school facilities.[2] The parties to the lease agreement would be the teacher and the School District, represented by the Principal.

The Code of Ethics provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.— (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7), Florida Statutes.]

Section 112.313(7) prohibits a teacher from having a contractual relationship with any business entity which is subject to the regulation of, or is doing business with, his or her agency. A teacher's agency is the school at which he or she is employed. See CEO 77-42, CEO 76-182, and see also CEO 91-58 (Principal's agency is the school).

As the teacher is prohibited from having an employment or contractual relationship with a business entity doing business with his or her school, we next review the definition of "business entity," which is defined at Section 112.312(5) to mean

> any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, *self-employed individual*, or trust, whether fictitiously named or not, doing business in this state. [E.S.]

Under this definition, even an individual such as a self-employed person performing tutoring services can be a "business entity." See, CEO's 96-17, 01-10. Therefore, a teacher providing tutoring services in his or her off-duty hours would have a contractual relationship with a "business entity." While a lease agreement constitutes "doing business" (CEO 86-24), the teacher's business entity would not be doing business with the teacher's agency (the school) but rather would be doing business with the school district. In CEO 91-58, we found that Section 112.313(7) would not be violated were a school principal to have part time employment with a company selling textbooks to the school district, to other schools within the district, or to other schools and districts outside of her school district, so long as she did not sell to her own school. Accordingly, the first part of section 112.313(7) would not operate to prohibit the proposed off duty employment.[3]

The second part of Section 112.313(7) prohibits a public officer from having any contractual relationship which would 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 the officer's public duties. This provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982).

Regarding a teacher's public responsibilities, your letter states:

> School Board Policy 1.013(3)(b), (4) provides the general responsibilities of teachers:
>
> > [3] b. Pursuant to § [1012.53], Fla. Stat., the primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement

> requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role.
>
> 4. It shall be the duty of the teacher to provide instruction, leadership, classroom management and guidance to pupils through democratic experiences that promote growth and development both as individuals and as members of society. Pursuant to § [1012.53], F.S., teachers shall perform duties prescribed by school board policies relating, but not limited, to helping students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully; using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the school board.

> Principals and teachers are required to try to help students at school before recommending tutoring: "Every effort shall be made by the Principal and employee to help the student with his/her difficulties at school before recommending that parents engage a tutor." Article II, Section L, "Tutoring," Paragraph 1, of The Collective Bargaining Agreement Between the School District of Palm Beach County, Florida and Palm Beach County Classroom Teachers Association, July 1, 2002 - June 30, 2005 ("CTA Agreement"). To the best of our knowledge, this provision refers to assisting students *in the scope of the regular school day*, and does not refer to assistance outside of the normal school day. [Emphasis in original.]

Under the proposed change to the collective bargaining agreement, teachers who engage in tutoring activities would continue to be prohibited from offering tutoring services to their own students. Therefore, it does not appear that there would be any substantial opportunity for a teacher to be tempted to compromise his or her public duty performance (for example, by being less vigorous regarding in-school teaching efforts) for the benefit of his or her private interests.

Allowing teachers to tutor students on school grounds would not alter this analysis. Section 112.313(6), Florida Statutes, prohibits the corrupt use of public resources for private gain, but as the use of school facilities will have been specifically authorized by the School Board under the proposed change to the collective bargaining agreement, it cannot be said that such use would be with wrongful intent. You have advised that teachers would not be permitted to use the secretarial services or consumable resources of the school in their private tutoring activities, and we caution that use of school resources without such permission could constitute a misuse of position.

Accordingly, allowing teachers to tutor students enrolled at their school, but not in their classes, on school grounds, whether for a fee or voluntarily and at no cost to the student, would not violate Section 112.313(7), Florida Statutes.

QUESTION 2:

> Would a prohibited conflict of interest exist if teachers were to hold an employment or contractual relationship with a company offering tutoring services to students on school grounds, after school hours?

Your question is answered in the negative.

The materials submitted to our office indicate that teachers may be employed by private "tutoring companies" which would operate on District property. If, as in the case of individual teachers operating as tutors, the contracting party would be the School District, then since the teacher's agency is the school, rather

than the District, the teacher would not have a contractual relationship with an entity doing business with his or her public agency, and the first part of Section 112.313(7) would not be implicated.

Neither is there any apparent conflict under the second part of the statute. As the prohibition on tutoring one's own students would remain in place, it does not appear that a teacher's off-duty employment with a firm offering tutoring services–whether on or off the school's property–would undermine any public duty of the teacher.

QUESTION 3:

> If a teacher's employment involves teaching music, dance, art, or drama, would a prohibited conflict of interest exist if such employee were also to give private lessons for a fee to District students, including his or her own students, either on or off school property where such lessons are not remedial in nature?

Your question is answered in the affirmative.

Under the current collective bargaining agreement, teachers of music, dance, art, or drama, unlike the teachers of other subjects, are permitted to give private lessons, for a fee, to District students, including students enrolled in their own classes, where such lessons are not remedial in nature. The agreement currently prohibits giving such lessons on school property, and the District is contemplating changing the agreement to permit the use of District facilities for these activities. Teachers offering such tutoring would be subject to the same leasing requirements described for tutors or other community or commercial users of school facilities described in Question 1.

You posit that the rationale for permitting teachers of the arts to tutor their own students may be that

> these kinds of subjects are not tested on state achievement tests and the risk for a conflict of interest is far less when the private instruction is not for remedial purposes. For example, there would be no motivation for a teacher to teach the art/music lessons less effectively at school (potentially creating a need for remediation) if the outside lessons are allowed only in cases where the lessons are not for remedial purposes. Another potential reason involves the artistic method and artist/teacher's relationship to the student: art/music teachers are not fungible. Each teacher generally has a particular method, style, artistic emphasis, or talent that cannot necessarily be offered in exactly the same way by another art/music/dance/drama teacher.
>
> If a parent desires his/her child to receive extra art/music lessons in order to achieve greater artistic development (not remedial, but supplemental), the parent may understandably want the child to receive that extra instruction from the specific teacher that already has an artistic relationship with the child and has the particular emphasis, style, or talent involved in the lessons that the student already receives at school. If a different teacher were consulted privately, it could conflict with the specific method or stylistic emphasis to which the student is accustomed in lessons at school. Therefore, it would make sense educationally for the student to have the same teacher both at school and in private lessons.

The analysis with respect to the first part of Section 112.313(7), Florida Statutes is the same as with Questions 1 and 2. The teacher in question would not have a contractual relationship with an entity doing business with his or her agency, because any lease agreement would be with the District, rather than the school.

With respect to the second part of the statute, we disagree that the prohibition on remedial instruction effectively eliminates the potential for conflict. While this restriction may indeed reduce any motivation for a

teacher to teach less effectively at school, the teacher's responsibility to be objective in the in-school treatment of his or her students may be compromised when some of the students are also privately taking lessons from that teacher. A teacher who has a private contractual relationship with the parents of some of his or her students may be tempted to demonstrate favoritism to those students in grading, assignment of roles in school performances and events, and other in-class treatment. In CEO 84-111, we discussed the issue of supervisors having contractual relationships with subordinates outside the workplace. While we found that no violation would exist under the circumstances at issue there, we pointed out that, "It is possible that where a public employee has an ongoing business relationship with a subordinate, that private business relationship and the employee's interests in keeping that relationship harmonious, productive, and profitable would impede the employee's duty of impartially evaluating the subordinate's job performance and would lead to the frequently recurring conflict between those interests." Similarly, where a teacher gives private lessons to some of his or her own students, there is the potential for the teacher's responsibility to treat the child impartially to be impeded by the desire to maintain a harmonious relationship with the child and parents as a private tutor. By this we do not mean to suggest that the teacher would actually succumb to such temptation and thereby compromise his public duties in favor of his private interests. The statute is entirely preventative in nature.

Again, the location of the lessons–whether on or off school property–would have no impact on the analysis. Also, as noted in Question 1, school resources should not be used. Accordingly, we find Section 112.313(7) would be violated were a teacher of art, music, drama, or dance to give private lessons for a fee to his or her own students, but would not be violated if such lessons were given on school property to students who are not in the teacher's classes, without using school resources.

QUESTION 4:

> Would a prohibited conflict of interest exist were a teacher to tutor students in a summer tutorial program initiated by the teacher and including students who were enrolled in that teacher's class during the preceding school year?

You state that the District currently sponsors certain summer tutorial programs at no charge to the student. Pursuant to their contract, teachers employed to teach in these programs receive supplemental pay from the District, and the curriculum is set by the District. Students in these programs may, you advise, be students who were enrolled in the teacher's class during the preceding school year. Under such circumstances no conflict would exist because the teacher has no contractual relationship outside that of his or her employment as a teacher.

You ask whether a conflict would exist were a teacher were to initiate such a program where a school does not offer a District-sponsored program. We decline to answer this question, inasmuch as it appears that the question is wholly hypothetical and that the matter will not even be considered until and unless a decision is made allowing private individual tutoring on school grounds. 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. Therefore, we invite you to contact us (or our staff) for further advice if and when a more concrete proposal is under consideration.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 14, 2004 and **RENDERED** this 19th day of October, 2004.

Joel K. Gustafson, *Chairman*

[1] Except for students of art, music, etc., which will be addressed in response to your Question No. 3.

[2] School Board Policy 7.18 establishes requirements for the use of school facilities by community and commercial organizations. A rate schedule sets the fee for use of a classroom by a commercial entity at $20 per hour. Under the policy, the superintendent has discretion to reduce or waive the fee for any entity.

[3] There is no indication that the school "regulates" the teachers.

CEO 05-14 -- September 7, 2005

CONFLICT OF INTEREST

MEMBER OF PERSONNEL BOARD LEASING SPACE TO COUNTY

To: Name withheld at person's request

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(3) and (7), Florida Statutes, were a member of the Pinellas County Unified Personnel System Board to lease office space to Pinellas County.

QUESTION:

Would a conflict of interest exist were a member of the Pinellas County Unified Personnel System Board to lease office space to Pinellas County?

Your question is answered in the affirmative.

In your letter of inquiry, additional materials supplied to this office, and telephone conversations between you and your staff and ... and this office, you advise that ... is a member of the Pinellas County Unified Personnel System Board ("Board"). The Board was created by the Pinellas County Unified Personnel Act[1] to establish a personnel system for employees of the Board of County Commissioners, Clerk of the Circuit Court, Property Appraiser, Supervisor of Elections, and Tax Collector[2]. The Act establishes a classified service which encompasses all positions in the enumerated agencies (except for certain specified exempt positions) and provides that the Board administer the Act, make rules, oversee personnel transactions and reclassifications, and hear appeals. The Act makes the Board the final authority in all personnel actions.

The Board consists of seven members, two appointed by the Board of County Commissioners, two by the Clerk, Property Appraiser, Supervisor of Elections, and Tax Collector acting as a body, and two by the Employee Advisory Council[3]. The seventh member is appointed by the other six. The Board meets once a month, and members receive a $100 stipend for each meeting attended--$150 if they chair the meeting.

You state that the member in question was appointed in 2003 and reappointed in 2005 by the Clerk, Property Appraiser, Supervisor of Elections, and Tax Collector acting as a body. The member's IRA holds property which includes an office building, and the member would like to lease space in the building to the County, probably to house one of the departments under the County Administrator. While the precise terms of the lease have not been established, it is anticipated that it will be for about 1,500 to 2,000 square feet of office space, or about 15-20 percent of the total space in the building. The lease price will be $13 per square foot per year, with the resulting income to the member approximately $20,000 per year, about $2,000 of which will be profit. You advise that the profit will represent approximately .5% of the member's total annual income.

You inquire whether the leasing arrangement will cause a prohibited conflict of interest.

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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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

The first part of this section prohibits a public officer from acting in his official capacity to purchase, rent, or lease any goods, services, or realty from a business entity in which he is an officer or director or in which he owns a material interest.[4] The second part prohibits a public officer from acting in his private capacity to sell, rent, or lease any goods, services, or realty to his public agency or to the political subdivision in which his agency is located.

Section 112.312(2), Florida Statutes defines "agency" as "any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university." Therefore, the member's "agency" for purposes of this provision is the Personnel Board. Compare, CEO 90-7 (agency of city planning board member is the planning board, not the city) and opinions cited therein. While the member would not be leasing to his own agency, by renting office space to the County, he would be leasing to the political subdivision he serves. Thus, a conflict would exist under Section 112.313(3), Florida Statutes.

The Code of Ethics also provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7), Florida Statutes.]

The first part of Section 112.313(7) prohibits a public officer or employee from having a contractual relationship with any business entity doing business with his agency. Since, as discussed, the County rather than the Personnel Board would be the lessee, the member would not be "doing business" with his own agency, and the first part of the statute is inapplicable here.

The second part of Section 112.313(7) prohibits a public officer from having any contractual relationship which would 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 establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

You advise that the Personnel Board enacts and amends personnel rules relating to, among other things, hiring, promotion, pay scales and overtime. In addition, it establishes criteria for positions, establishes and eliminates positions, and hears appeals. You state that the Board's actions with respect to matters other than appeals are generally uncontested and that the Director of Personnel typically works with the various appointing authorities and the Employee Advisory Council to reach consensus so that by the time the matter reaches the Board for approval, it is unopposed. As to appeals, you advise that they constitute a very small percentage of the Board's work, averaging only two or three a year since 1998. However, because of their nature, you add, the appeals consume about 50 percent of the Board's time. Additionally, approximately 90 percent of the appeals deal with County employees (as opposed to employees of the Clerk, Property Appraiser, Supervisor of Elections or Tax Collector).

In CEO 85-56, we found that a conflict of interest would exist were an employee of a regulated municipality to serve on the governing board of the water authority having jurisdiction over the municipality. We found there that a temptation would exist for the employee to favor his employer in decisions which might affect the city. We observed that in Section 112.311(1), Florida Statutes,

> the Legislature declared it to be their intent and policy underlying the Code of Ethics that public officials be both independent and impartial. We do not mean to imply that Mr. Bollinger intentionally would favor his employer; however, we feel that a tendency in that direction would exist even in the absence of any overt partiality. This is the essence of a conflict of interest which the Code of Ethics seeks to avoid.

In a slightly different context, we have recognized that a public officer's or employee's desire to maintain a harmonious and productive private relationship with those whose interests he can affect in his public capacity may give rise to a conflict of interest under the second part of Section 112.313(7), Florida Statutes. For example, in CEO 88-25 we found that a conflict would exist were a district medical examiner to appoint as an associate medical examiner a member of a professional association of which the district medical examiner was a member.

There is a potential here that, because of the lease agreement, the member may be tempted to side with the County on issues before the Board. His financial interest in maintaining good relations with the County, while not overwhelming, is certainly substantial, and his opportunity to affect matters in which the County has an interest, particularly in the case of appeals, is significant. Viewing the facts you have described in light of the principles set forth above and the intent of the law, it seems to us that the circumstances would present the member with a "temptation to dishonor" his public responsibilities. We hasten to add that we do not mean by this opinion to impugn the personal integrity of the member or to suggest that he would yield to the temptation recognized by the statute. The statute does not require an actual transgression; it is preventive.

Accordingly, we find that a prohibited conflict of interest would exist were a member of the Pinellas County Unified Personnel System Board to lease office space to Pinellas County.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 1, 2005 and **RENDERED** this 7th day of September, 2005.

Thomas P. Scarritt, Jr.
Chair

[1] Chapter 77-642, Laws of Florida, as amended by Chapters 89-419 and 95-474,Laws of Florida.

[2] You advise that the Board provides personnel services for a total of eleven "appointing authorities": the County Administrator, the County Attorney, the Tax Collector, the Property Appraiser, the Supervisor of Elections, the Clerk, the Personnel Director, the Office of Human Rights, the Office of Information Technology, the Pinellas Planning Council, and the Pinellas County Licensing Board.

[3] The Employee Advisory Council, also established by Chapter 77-642, is a board consisting of 15 members of the classified service, selected by their co-workers and charged with developing and recommending ideas related to working conditions, morale, public image, efficiency, employee safety, and employee benefit programs.

[4] Defined at Sec. 112.312(15), Fla. Stat., to mean "direct or indirect ownership of more than five percent of the total assets or capital stock of any business entity."

CEO 07-9 -- April 25, 2007

CONFLICT OF INTEREST

DCF CONTRACT MANAGER EMPLOYED BY SUBCONTRACTOR OF NONPROFIT CORPORATION CONTRACTING WITH DCF

To: Name withheld at person's request

SUMMARY:

A prohibited conflict of interest exists under the second portion of Section 112.313(7)(a), Florida Statutes, where an employee of the Department of Children and Family Services serving as a contract manager of a Department contract with a nonprofit is employed secondarily by an organization subcontracting with the nonprofit to perform a portion of the services deliverable under the contract. CEO 89-15 is referenced. [1]

QUESTION:

Does a prohibited conflict of interest exist where you, a contract manager for the Department of Children and Family Services, are employed by a subcontractor of a nonprofit corporation contracting with the Department?

Under the circumstances presented in your inquiry, your question is answered in the affirmative.

By your letter of inquiry and additional information provided to our staff, we are advised that you are employed by the Department of Children and Family Services[2] (DCF), in its District 7, working as a contract manager. Further, we are advised that you are secondarily employed by an organization which is a subcontractor to a nonprofit corporation which supplies community based care (CBC) services under a contract with the Department. In addition, we are advised that your work for the organization occurs outside the DCF District of your public employment (in the Department's District 13) and is unrelated to your public capacity duties. However, we are advised that as a DCF contract manager you oversee DCF's contract with the nonprofit and that the nonprofit subcontracts its case management (CMO) services, deliverable under its contract with DCF, to several subcontractors, including the organization secondarily employing you.

Section 112.313(7)(a), Florida Statutes, the provision of the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) which is applicable to your inquiry, provides:

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

The second portion[3] of Section 112.313(7)(a) prohibits a public employee from having any employment or contractual relationship that will create a continuing or frequently recurring conflict or that would impede the full and faithful discharge of her public duties.

In our view a prohibited conflict of interest exists under this provision as you, in your DCF capacity as a contract manager, are responsible for a contract between the nonprofit and DCF which involves the organization (your private employer) as a subcontractor actually performing the services delivered for the nonprofit under the same contract. Our decision herein is consistent with our decision in CEO 89-15, in which we found that a prohibited conflict existed for a district program manager of the former Department of Health and Rehabilitative Services (DHRS) where she worked privately/secondarily for a school board contracting with DHRS and where she was required in her DHRS capacity to supervise individuals responsible for contracts between DHRS and the school board.

In making our decision herein, we have not overlooked your arguments that DCF's contractual obligation is to the nonprofit (with which you are not employed) and is not to the organization (with which you are secondarily employed) or to the other subcontractors of the nonprofit; that you are not responsible for the organization's compliance with its contractual obligations as a subcontractor to the nonprofit; that you are not in a position to make a DCF capacity decision regarding the organization's daily operations or practice; that District 13 and District 7 have different contract managers; and that the District 13 subject matter may be different from the District 7 subject matter. Instead, we are not persuaded that as a matter of fact, under applicable law, your DCF duties do not have the potential to impact your secondary employer (a subcontractor), given, inter alia, that you manage the contract that is in part deliverable via the performance of the subcontractors. For example, you might be tempted, in your DCF contract manager capacity, to ignore nonperformance or similar conduct of the nonprofit under its contract with DCF if the nonperformance related to conduct of the organization (a subcontractor). In reaching our conclusion we do not mean to imply that you actually would be influenced by the interests of your outside employer when managing the DCF contract. The statute is entirely preventive; it is directed at what might happen. Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

Accordingly, we find that a prohibited conflict of interest exists where you are secondarily employed by a subcontractor of a nonprofit contracting with the Department under a contract managed by you in your capacity as a Department employee.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 20, 2007 and **RENDERED** this 25th day of April, 2007.

_____

Norman M. Ostrau, Chairman

[1]Prior opinions of the Commission on Ethics are viewable on its website: www.ethics.state.fl.us

[2]Frequently referred to as the Department of Children and Families.

[3]The first portion of the statute is not at issue in that the organization (the business entity with which you are employed secondarily) is not doing business with DCF; rather, the nonprofit, which is not your secondary employer, is doing business with DCF under a contract.

CEO 09-3 – January 28, 2009

CONFLICT OF INTEREST

CITY FIRE DEPARTMENT PERSONNEL INDIVIDUALLY TAKING COURSES FROM FIRE LIEUTENANT'S COMPANY

To: William VanHelden, Fire Chief (City of Cape Coral)

SUMMARY:

A prohibited conflict of interest does not exist under Section 112.313(7)(a), Florida Statutes, where a city fire lieutenant is part owner of a company that provides training classes to individual city personnel, provided that persons subject to his public capacity evaluation and recommendation are not students of the company. CEO 04-17 is referenced.

QUESTION:

Does a prohibited conflict of interest exist where a city fire lieutenant is part owner of a company that provides training classes to individual city personnel?

Your question is answered as set forth below.

By your letter of inquiry, we are advised that you serve as Fire Chief for the City of Cape Coral and that you ask whether a subordinate of yours, Fire Lieutenant Robert Blasetti (Lieutenant),[1] has a prohibited conflict of interest under the Code of Ethics for Public Officers and Employees, under the following circumstances.[2] Continuing, you advise that the Lieutenant is part owner of a company that provides training to fire service and health care personnel, that City Fire Department personnel are eligible to take the type of training classes offered by the company, and that pursuant to applicable collective bargaining agreements, City Fire Department personnel are entitled to reimbursement from the City for their costs of courses taken through providers such as the company. In addition, you advise that the City does not have and, to your knowledge, has never had a direct business relationship with the company. Further, you advise that the courses offered by the company are voluntary, that some courses can be taken by Fire Department personnel who are seeking certifications in order to become qualified for promotion, and that taking other courses may entitle personnel to additional pay pursuant to the fire union contract.

Additionally, you advise that the Lieutenant, in his public capacity, does not have authority to approve any training classes for members of the Fire Department. Further, we note that the Lieutenant's job description, supplied by you to our staff, provides, inter alia, as follows:

> Evaluates personnel for efficiency and effectiveness. Recommends personnel action of hiring, promotion, discipline or termination. Provides technical support and guidance in their work activities.

Section 112.313(7)(a), Florida Statutes, is the prohibition within the Code of Ethics most applicable to your inquiry. It provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an

> agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The second part of the statute[3] is in need of treatment under your inquiry.

We find that under the second part of Section 112.313(7)(a), a prohibited conflict of interest exists for the Lieutenant if his company provides courses to Fire Department personnel regarding whom he has evaluation or recommendation responsibility. In such a situation, there exists a continuing or frequently recurring conflict between his private interests (interests of his company in competing for and handling students) and the performance of his public duties (the duty to objectively evaluate, recommend, and supervise persons without regard to whether they are taking classes from his company) or there exists an impediment to the full and faithful discharge of his public duties occasioned by the same public-private tension. However, we do not find that a prohibited conflict exists if his company's students are not persons subject to his public capacity evaluation and recommendation. In such a situation, the "temptation to dishonor"[4] would not be present. In accord with our finding herein, see CEO 04-17, in which we found that no prohibited conflict of interest would be created were a public school teacher to engage in tutoring for pay public school students, or to be employed by a company providing such tutoring services, provided the teacher did not tutor his or her own students.

And we do not find that the situation implicates Section 112.313(3), Florida Statutes. Regarding its first part, assuming arguendo that the situation presented involves the City's (a political subdivision's) purchase of services from the Lieutenant's company, the situation does not indicate that the Lieutenant himself acted as a "purchasing agent" [defined at Section 112.312(20), Florida Statutes] to make any purchases from the company in behalf of the City. Rather, it appears that the City's governing board (itself never in a direct relationship or privity with the Lieutenant's company) entered into a collective bargaining agreement, some years before the Lieutenant was promoted to his current public position, which resulted in an obligation of the City to reimburse course-takers. Similarly, under the second part of Section 112.313(3), assuming arguendo that the Lieutenant will be acting in a private capacity to sell the company's services to the City or an agency of the City, the situation presented indicates that persons other than the Lieutenant, City officials and personnel who negotiated and entered into the collective bargaining agreement, had the public agency responsibility for creating the "relationship" between the City and the company, such that Section 112.316, Florida Statutes, would apply to negate any conflict for the Lieutenant. Sections 112.313(3) and 112.316 provide, respectively:

> 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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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. [Section 112.313(3), Florida Statutes.]

CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

Accordingly, we find that the Lieutenant's relationship with a company privately teaching courses to fire and health care personnel is not conflicting, provided that no personnel regarding whom he has evaluation or personnel action recommendation responsibility take courses from the company.

ORDERED by the State of Florida Commission on Ethics meeting in public session on January 23, 2009 and **RENDERED** this 28th day of January, 2009.

_____

Cheryl Forchilli, Chair

[1] Your authority under the City's personnel rules and regulations, as represented in your inquiry, to hire, discipline, and terminate all employees in the Fire Department, establishes your standing, under Section 112.322(3)(a), Florida Statutes, to make inquiry regarding the Lieutenant.

[2] You advise that the Lieutenant has been employed since 1998 and was recently promoted from Fire Engineer/Driver to his current position.

[3] We do not find that the Lieutenant's situation implicates the first part of the statute because his situation does not indicate that his company is either doing business with or is subject to the regulation of his public agency, the Fire Department. And assuming arguendo that the Fire Department somehow "regulates" the company vis-à-vis prescribing content for its courses offered to students, your inquiry states that the Lieutenant himself does not have authority to approve any training classes for members of the Department. In such a situation, Section 112.316, Florida Statutes, would appear to negate a prohibited conflict for the Lieutenant. See Section 112.316, infra.

[4] See Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

CEO 09-10 -- June 17, 2009

CONFLICT OF INTEREST

COUNTY COMMISSION MEMBER'S LAW FIRM REPRESENTING CLIENTS BEFORE THE COMMISSION

To: Richard E. Coates, Attorney for County Commissioner (Palm Beach County)

SUMMARY:

A prohibited conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes, would be created were a member of a county commissioner's law firm to represent a client before the county commission; however, no conflict would be created were the representation to be before other boards of the county. CEO 77-126, CEO 78-86, CEO 88-40, CEO 89-47, CEO 96-1, and CEO 07-13 are referenced; CEO 76-142, CEO 03-3, and CEO 03-7 are distinguished.

QUESTION:

Would a prohibited conflict of interest be created were a member of a County Commissioner's law firm to represent a client before the County Commission?

Your question is answered in the affirmative.

By your inquiry, we are advised that Steven L. Abrams (Commissioner) serves as a member of the Palm Beach County Commission, recently having been appointed by the Governor to fill a vacancy. In addition, we are advised that the Commissioner is an attorney employed with a full-service law firm which operates five offices in the State, which contains over sixty-five practicing attorneys, and which has over one hundred total employees. Further, we are advised that the Commissioner's firm infrequently has represented clients before the Palm Beach County Commission and would like to do so prospectively, but that the Commissioner himself will not be representing clients before the County Commission.[1]

Continuing, regarding the Commissioner's relationship with his firm, you advise that he holds the title of "Partner," which you state is more accurately described as an "Of Counsel" relationship, with his essentially being an employee of the firm.[2] Further, you advise that the Commissioner is paid a fixed salary by the firm, based upon his personal productivity, which has not changed as a result of his appointment as a County Commissioner, that his firm compensation is not based upon, nor derived from, funds paid to the firm on matters related to the County or the County Commission (and that he will not be compensated from such funds/fees of the firm, and that it is not the firm's standard practice to issue performance bonuses throughout the year, such that the Commissioner does not share in the profits of the firm. Additionally, you advise that the Commissioner does not have responsibility for the day-to-day or long-term management of the firm, nor is he privy to the firm's financial records, and that the firm is managed by its two equity shareholders and a professional, non-lawyer staff who enforce firm policies and control firm financial matters. And, you advise, the firm does not have access to the personal financial affairs of the Commissioner.

Also, you emphasize that the Commissioner will not appear before the County Commission in behalf of any of the firm's clients, that he will not lobby other County Commissioners on matters of interest to the firm's clients, that he will not have conversations or discussions with County staff or County employees relating to firm client issues, and that he will not participate in any way in the representation of the firm's clients in matters relating to the County Commission or the County. However, you advise that other attorneys of the firm and firm clients themselves may appear before the County Commission;[3] that clients of the firm shall be advised (prior to commencing the representation) of the Commissioner's public office and its attendant legal/ethical obligations;

that the Commissioner will declare a voting conflict, abstain from voting, and timely file CE Form 8B, regarding County Commission measures where firm clients or firm attorneys appear before the County Commission; and that no member of the firm will lobby the Commissioner. Additionally, you advise that the firm will advise its clients with business before the County Commission that the Commissioner will not provide any legal services in front of the County Commission in behalf of the client, and that each client must agree to the arrangement.

Relevant to your inquiry and contained within the Code of Ethics is Section 112.313(7)(a), Florida Statutes, which provides:

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

As an attorney in the firm, the Commissioner has a contractual relationship with the firm and, consistent with our prior opinions, he also has a contractual relationship with each client of the firm. CEO 96-1, CEO 07-13.[4] Therefore, we find, as we have in several situations similar to the Commissioner's, that his contractual relationship with the firm OR with clients of the firm would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or would impede the full and faithful discharge of his public duties, under the second part of the statute, in the event a firm member represents a client before the County Commission.

We have said on more than one occasion that "[t]he representation of a client before a board of which one is a member interferes with the full and faithful discharge of one's public duties, in violation of s. 112.313(7)(a) . . . ." CEO 77-126, CEO 88-40. Even a single instance of such conduct impedes the performance of the public officer's duty, and thus violates the statute. CEO 78-86, CEO 89-47. Thus, it is clear that the Commissioner would be prohibited from representing clients before the County Commission. Further, in CEO 78-86, we found that this conflict of interest could not be mitigated or avoided by having another member or an employee of the public officer's professional firm represent the client before his board. Also, assuming the Commissioner's relationship to his firm to be a true "Of Counsel" relationship, a relationship arguably less beholden or tied to the interests of a firm or its clients than that of a partner, shareholder, or associate, we find that the prohibited conflict would nevertheless exist, due to his contractual relationship with the firm and a duty of loyalty to the firm's clients which would create a conflict when the firm was representing a client before the County Commission. See CEO 07-13; and see CEO 96-1 (Jacksonville Electric Authority member special counsel to law firm), in which we said:

> because of the Board member's close, regular, and continuing relationship with the law firm and duty of loyalty to the clients of the law firm . . . An impediment to public duties could exist for the Board member to favor the law firm or the client (his private interests) and to disregard his public duty to act independently and impartially in the best interests of the JEA, when the firm's representation of the client involves the JEA.

In making our finding herein, we have not overlooked CEO 03-3, a previous opinion of ours in which we found that a conflict of interest would not be created under Section 112.313(7)(a) were other members of the law firm of a State Senator to represent clients before the Legislature, provided a number of conditions were adhered to. However, CEO 03-3 concerned a particular member of the Florida Legislature in a particular factual context; the government body of which the person seeking the opinion was a member (the State Legislature) differed significantly, in its membership size, operations, composition, and subject matters addressed, from the local

government body of which the Commissioner is a member; and we made it clear in CEO 03-3 that its advisory effect, if any, beyond the effect on the person specifically requesting it went only so far as other members of the Legislature (not to persons at the local government level). See note 11 of CEO 03-3. In sum, notwithstanding that the Commissioner has represented that he would adhere to restrictions or conditions similar to those placed on the Senator in CEO 03-3, we find that the dynamic of local government (which, even in populous counties, is governed by boards with relatively small memberships), vis-à-vis private interests seeking its action, decisionmaking, or inaction, would remain qualitatively different from that of the State Legislature (a two-house body totaling 160 members), such that reasoning and safeguards akin to those present in CEO 03-3 would not prevent conflict.[5] Moreover, as a member of a Commission whose membership is relatively small in number, the Commissioner's opportunity to impact County decisionmaking is much greater than that of a State Legislator to impact State decisionmaking.

Accordingly, we find that a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, would be created were a member of the subject County Commissioner's law firm to represent a client before the County Commission.[6]

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 12, 2009 and **RENDERED** this 17th day of June, 2009.

Cheryl Forchilli, Chair

[1] More specifically, you advise that the Commissioner practices law in the area of transactions, working mostly with municipalities and other governmental entities in behalf of clients of his law firm, that he will not represent clients before the Palm Beach County Commission, including not participating in client matters that are before the County Commission, that he will participate in business development for all areas of the firm's practice, except regarding clients with issues before the County Commission, that the firm will put policies and procedures in place to prevent the Commissioner from participating in, or having express and detailed knowledge of, client matters before the County Commission, that the firm will notify the Commissioner of the names of clients with business before the County Commission, such that the Commissioner may take all actions necessary to comply with the State Code of Ethics, and that the firm will perform client conflict searches regarding the Commissioner, for all existing and new clients of the firm, on a regular and ongoing basis, to alert the Commissioner and the firm that a client has a matter pending before the County Commission, even if the firm is not representing the client in the matter.

[2] Also, you advise that, regarding the Commissioner and his firm, the title "Partner" does not denote ownership in the firm, that the firm uses the titles of "Shareholder," "Partner," and "Associate" to delineate between seniority and experience levels of the firm's attorneys, and that although the firm has many "Shareholders" and "Partners," it has only two equity members, neither of which is the Commissioner.

[3] Your inquiry states that other firm attorneys and firm clients "may appear before the [C]ounty [C]omission and conduct business with the [C]ounty." We do not read the underscored portion (our emphasis) of the statement to mean that clients of the firm will be selling goods or services to, or otherwise "doing business with," the County within the meaning of the first part of Section 112.313(7)(a), Florida Statutes, as we read your inquiry to focus on the second part of Section 112.313(7)(a). Instead, we read the underscored portion to refer to appearances before or discussions with the County Commission or County personnel. Also, we do not read your inquiry to present the question of whether a "regulatory" conflict of interest exists for the Commissioner under the first part of the statute.

[4] The Commissioner's position with the firm as set forth in the inquiry appears to us to be like the employee-member of the firm in CEO 07-13, rather than an "of counsel" relationship. However, assuming arguendo that his position is "of counsel," such that he would not hold a contractual relationship with every client of the firm (see CEO 03-7), our finding herein also is grounded in our reasoning (see CEO 96-1) which recognizes an "of counsel" attorney's duty of loyalty to the firm and the firm's clients.

[5] CEO 03-7 and CEO 76-142, also cited in your inquiry, have not been overlooked by us. However, neither opinion concerns the second part of Section 112.313(7)(a), the portion of the prohibition at issue regarding the Commissioner. While the "of counsel" status of a city council member/attorney negated some conflicts in CEO 03-7, the facts of the inquiry did not involve the member's firm's representation before the city council. And, assuming arguendo that the "legislative body" exemption of Section 112.313(7)(a)2, Florida Statutes, would apply to officers other than members of the Florida Legislature, it would not apply to conflicts arising under the second part of Section 112.313(7)(a). See CEO 03-3 and opinions cited therein.

[6]However, we find that a prohibited conflict under Section 112.313(7)(a) would not be created for the Commissioner due to representation by other members of his law firm before County boards other than the County Commission. These representations should be reported on CE Form 2 (Quarterly Client Disclosure); and the Commissioner should contact The Florida Bar regarding such representations. See CEO 07-13 (Question 2).

CEO 10-3 - March 3, 2010

CONFLICT OF INTEREST; DOING BUSINESS; VOTING CONFLICT

SCHOOL BOARD CANDIDATE WHO IS EMPLOYED BY NON-PROFIT ENTITY CONTRACTING WITH SCHOOL DISTRICT AND WHOSE RELATIVES' FIRMS DO BUSINESS WITH SCHOOL DISTRICT

To: *Mark Herron, Esquire (Tallahassee)*

SUMMARY:

A continuing or frequently recurring conflict of interest and an impediment to the full and faithful discharge of public duty would be created were a school board member to remain employed as the program director for a non-profit business and education alliance that receives funding from the school district, due to an impermissible overlap between her private interests and her public duties.

With regard to the school board's contract with an insurance agency in which her husband owns a material interest, the existing contract would be "grandfathered-in" because it was executed prior to her qualification for elective office and would not violate Section 112.313(3), Florida Statutes. Nor would a prohibited conflict of interest be created were the agreement to be renewed as provided in the agreement for three additional one-year terms, as long as the provisions in the renewed agreement remain the same as those of the original. She would be required to abstain from voting to renew the contract pursuant to Section 112.3143(3), Florida Statutes, as it would inure to the special private gain or loss of her husband.

As long as the school board member abstains from voting on matters that inure to the special private gain or loss of the law firm that serves as counsel to the school board and where her brother is a shareholder, no prohibited conflict of interest is created by that situation.

QUESTION 1:

Does a prohibited conflict of interest exist where a school board member is employed by a non-profit business and education alliance contracting with the school district?

Based upon the circumstances presented, your question is answered in the affirmative.

This opinion is sought on behalf of your client,....., who is contemplating becoming a candidate for the Leon County School Board. You inquire about the prospective candidate's current employment situation and whether it would create a prohibited conflict of interest if she were to be elected to the School Board, and also whether business dealings between her husband's insurance agency and the School District, and her brother's law firm and the School District, create prohibited conflicts of interest for her. We will examine her employment situation first.

You explain that, presently, your client is employed by the Greater Tallahassee Chamber of Commerce, Inc., where she serves as Program Director for World Class Schools of Leon County, Inc. ("WCSL"), "a non-profit business and education alliance between the Chamber and the School District focused on creating a World Class system where all students achieve high academic standards and are prepared for post secondary education and direct high wage employment."[1] You explain further that the WCSL program facilitates and supports the following activities:

- Identify and recruit a Board of Directors to regularly review the Leon County School Board strategic plan outcome data and approve the activities of WCSL mutually agreed upon with the Leon County School Board, that support student performance improvement.
- Research program information and possible resources from other states and national initiatives, foundations, and businesses that may support the School Board's strategic plan goals and strategies.
- Identify and support business community "Champions" who can bring expertise and support to increase the effectiveness and efficiency of school district programs and departments.
- Assist in implementing grant funded and other projects, mutually agreed upon with the Leon County School Board.
- Become involved in and support efforts of the Leon County School Board to recruit, train, and retrain high quality teachers, administrators, and staff.

The current contract with the School District was entered into in August 2009, and funds the program in the amount of $50,000 through June 2010.

The applicable provision of the Code of Ethics is as follows:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7)(a), Florida Statutes.]

This provision prohibits a school board member from having an employment relationship with a business entity that is doing business with or regulated by her agency. It also prohibits employment relationships which create continuing or frequently recurring conflicts between private interests and the performance of public duties, or which impede the full and faithful discharge of public duties.

In a number of opinions, we have concluded that Section 112.316, Florida Statutes, operates to "grandfather in" contracts that were entered into prior to assuming public office. See CEO 02-14, where we concluded that a school board member would not violate Section 112.313(7)(a), Florida Statutes, where he was employed with an investment banking firm chosen by the school district to market its bonds before he took office. We have also applied Section 112.313(15), Florida Statutes, to exempt conflicts where the school board member was employed by a tax-exempt education foundation. See CEO 07-11. Section 112.313(15), Florida Statutes, provides:

ADDITIONAL EXEMPTION.—No elected public officer shall be held in violation of subsection (7) if the officer maintains an employment relationship with an entity which is currently a tax-exempt organization under s. 501(c) of the Internal Revenue Code and which contracts with or otherwise enters into a business relationship with the officer's agency and:

(a) The officer's employment is not directly or indirectly compensated as a result of such contract or business relationship;
(b) The officer has in no way participated in the agency's decision to contract or to enter into the business relationship with his or her employer, whether by participating in discussion at the meeting, by communicating with officers or employees of the agency, or otherwise; and
(c) The officer abstains from voting on any matter which may come before the agency involving the officer's employer, publicly states to the assembly the nature of the officer's interest in the matter from which he or she is abstaining, and files a written memorandum as provided in s. 112.3143.

However, in our view, even if the contract were considered to be "grandfathered-in," or even if all of the conditions in Section 112.313(15) were met, we still must consider whether her employment with WCSL creates a prohibited conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes, i.e., a continuing and frequently recurring conflict or an impediment to the full and faithful discharge of her duties as a member of the School Board.

In CEO 06-23, we opined that a school board member would violate the second part of Section 112.313(7)(a), Florida Statutes, were she to remain employed as an assistant principal at a charter school after her election to the school board. In that situation, we found that the school board member's ability to objectively evaluate the performance of the charter school would be compromised if she continued to be employed there because a public officer cannot serve two masters with potentially differing interests regarding the same subject matter. *Zerweck v. State Commission on Ethics*, 409 So. 2d 57 (Fla. 4th DCA 1982). Here, where the School Board candidate directs the work of WCSL on behalf of her employer, she must chose whether to continue as Program Director of WCSL or to hold the office of School Board member, as the two would create a prohibited overlap. Moreover, as we noted in Footnote 7 of CEO 06-23:

In making our finding of a prohibited conflict, we do not impugn the character or personal integrity of the member. As the *Zerweck* court noted, the statute is purely preventive in nature; it is concerned with what "might happen." The statute requires no intentional or wrongful transgression on the part of the member such as would be required for a corrupt use of position under Section 112.313(6), Florida Statutes; and we find no such transgression on the part of the member. Our opinion herein addresses only the incompatibility of simultaneously holding both the School Board seat and employment as assistant principal of the charter school.

That sentiment is equally appropriate here.

Accordingly, we find that a School Board member would be prohibited from simultaneously holding office and being employed as Program Director of a non-profit business and education alliance that contracts with the School District.

QUESTION 2:

Does a prohibited conflict of interest exist where a school board member's husband owns a material interest in an insurance agency that provides insurance services to the school board?

Under the circumstances set forth below, your question is answered in the negative.

You explain that the prospective candidate's husband owns a material interest in an insurance agency that currently has a contract with the school district to provide certain insurance related products and benefits. The contract was entered into in 2007 for a three-year term, and can be extended by the School District for three additional one-year periods.

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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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.
[Section 112.313(3), Florida Statutes.]

This provision prohibits a public officer from acting in her official capacity to purchase services for her agency from a business entity in which her spouse is an officer, partner, director, or proprietor of, or in which he owns a material (greater than 5 percent) interest. However, as you note in your inquiry, Section 112.313(3)(b) contains a grandfathering provision for business entered into prior to the public officer's qualification for elective office. Thus, the School District's contract with the insurance agency would not violate Section 112.313(3), Florida Statutes, as it was entered into long before her qualification for elective office.

As to whether that contract can be renewed, in CEO 02-14, Question 2, we concluded that where an original contract specifically provides for time-certain extensions, then "grandfathering" will apply to those renewals, provided the terms of the contract remain the same as those of the original. However, the school board member would be required to comply with the voting conflicts statute—Section 112.3143(3)(a), Florida Statutes—and abstain from voting on any renewal/extension of the contract with her husband's insurance agency and file the voting conflict form—CE Form 8B.

Future contracts between the School Board and the insurance agency would be prohibited unless one of the exemptions in Section 112.313(12), Florida Statutes, were applicable. For example, if the insurance services contract is awarded under a

system of sealed, competitive bidding to the lowest and best bidder, and if the School Board member otherwise complies with the conditions set forth in Section 112.313(12)(b), Florida Statutes, and files the CE Form 3A--Interest in Competitive Bid for Public Business, no conflict would be created if the School Board were to enter into another contract with the insurance agency in which the School Board member's husband owns a material interest. See CEO 82-71, Question 2, which discussed the competitive bid exemption where the husband of a school board member owned a business that sold goods and services to the school district.

Question 2 is answered accordingly.

QUESTION 3:

Does a prohibited conflict of interest exist where a school board member's brother is a shareholder in a law firm that serves as counsel to the School Board?

Question 3 is answered in the negative; however, she would be required to abstain from voting on matters that inure to the special private gain or loss of the law firm in which her brother is a shareholder and file the memorandum of voting conflict form.

Your final question involves the prospective candidate's brother, who is a shareholder in a law firm that serves as counsel to the Leon County School Board. You write that the School Board entered into a continuing contract with the law firm in 2002 which is subject to termination with a 30-day notice. In CEO 82-25, we noted that Sections 112.313(3) and 112.313(7)(a), Florida Statutes, were inapplicable to a situation where the state attorney allowed his brother-in-law's company to provide a dental insurance program to employees in the state attorney's office. Similarly, both provisions are inapplicable here. However, the School Board member will have to comply with the voting conflicts law—Section 112.3143(3), Florida Statutes—when considering matters involving the law firm. It provides:

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.

This provision requires the School Board member's declaration of conflict, abstention from voting, and timely filing of the CE Form 8B (memorandum of voting conflict) regarding measures of the School Board that would inure to her brother's special private gain or loss, because the definition of "relative" in Section 112.3143(1)(b) includes one's brother. Whether a particular vote inures to the brother's special private gain or loss cannot be definitively addressed based on the limited facts before us. However, as a general rule, we would advise the School Board member to abstain from voting on matters that would result in gain or loss to the law firm since,

as a shareholder, it appears that her brother would stand to gain or lose from any vote that results in gain or loss to the law firm.

Question 3 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on February 26, 2010 and **RENDERED** this 3rd day of March, 2010.

_____

Roy Rogers, *Vice Chair*

cc: Mr. Mark Herron

CF/JCC/mwf

[1] http://www.wcsleon.com/about.shtml

CEO 10-12 -- April 21, 2010

CODE OF ETHICS

SCHOOL BOARD CANDIDATE EMPLOYED AS PRESIDENT OF SCHOOL UNIFORM COMPANY DESIGNATED "PREFERRED VENDOR" BY MANY DISTRICT SCHOOLS

To: Name withheld at the person's request (Miami)

SUMMARY:

No prohibited conflict of interest would be created under Sections 112.313(3) and 112.313(7)(a), Florida Statutes, were a school board member to be employed as president of a school uniform company that has been designated the "preferred vendor" by many of the district's schools. The school board member's company sells uniforms to the parents of individual school children, not to the school district or its schools. However, because of the school board's authority over its personnel, a school board member would be prohibited from personally soliciting school district personnel and school-related organizations like uniform committees, parent-teacher organizations, and school advisory councils to designate his company as the "preferred vendor" for a school's uniform.

QUESTION:

Would a prohibited conflict of interest be created where you, a candidate for the school board, are employed as president of a school uniform company that is designated the "preferred vendor" by nearly half of the district's schools that require uniforms?

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

In correspondence with our staff, you explain that your family owns a uniform company and that you have been employed as its president for twenty years. A majority of the public schools in Dade County have instituted a mandatory uniform policy pursuant to the procedures set forth in Miami-Dade County Public School Board 6Gx13-5C-1.031. This policy also allows schools to establish a uniform committee to select uniforms, and for the committee to designate a "preferred vendor." In this regard, the School Board's policy states:

> Schools are eligible to participate in a mandatory uniform program, if the following conditions are met:
>
> . . .
>
> B. The school establishes a uniform committee that adequately represents administrators, teachers, students, and parents and follows guidelines promulgated by the Superintendent for selection of uniforms. The committee cannot select a uniform committee as an "official uniform company" for a school. The committee can identify a uniform company as a "preferred" option; however, parents must be advised that the selected uniform or a generic option can be purchased from a variety of sources, such as other uniform companies, department stores, catalogs, etc. School patches or logos are optional.
> [Rule 6Gx13-5C-1.031]

You indicate that your company has been designated the "preferred vendor" in over 150 of the District's schools. You explain that the "preferred vendor" program is an informal, non-contractual, non-exclusive relationship between individual schools and their "preferred" choice of a school uniform vendor. The schools send out correspondence to parents and list on the school's website information about the school's uniforms that

includes the "preferred vendor's" name, along with an explanation that uniforms may be purchased from any source, not just from the "preferred vendor." You question whether your employment with a school uniform company and its designation as "preferred vendor" by many of the District's schools would create a prohibited conflict of interest if you were to be elected to the School Board.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> 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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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. [Section 112.313(3), Florida Statutes (2009).]
>
> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.— No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7)(a), Florida Statutes (2009).]

Absent "grandfathering" or the applicability of an exemption under Section 112.313(12), Florida Statutes, the first part of Section 112.313(3) prohibits a public officer acting in his official capacity from purchasing goods from a business entity of which he is, among other things, an officer, and the second part of Section 112.313(3) prohibits a public officer from acting in a private capacity to sell goods to his political subdivision or any agency of his political subdivision. Also, absent grandfathering or applicability of an exemption, Section 112.313(7)(a) prohibits a public officer from holding employment or a contractual relationship with a business entity which is doing business with the officer's public agency.

Sections 112.313(3) and 112.313(7)(a), Florida Statutes, are inapplicable to your situation because there is no indication that the School Board or District schools are purchasing uniforms from your company. You have also represented that the "preferred vendor" designation is an informal, non-contractual, non-exclusive relationship. In CEO 80-35, Question 2, we opined that the Code of Ethics would not be violated where an assistant superintendent and a school principal owned a business selling sporting goods and gym supplies to students or teachers as private individuals, but we warned the requestors, who were both high-ranking employees in the school system, to be extremely careful to avoid both the use of position and the appearance of such use in

connection with sales of athletic supplies to individual customers. In CEO 75-196, where a school board member owned an interest in a trophy shop that sold items to school-related organizations, we warned against the personal solicitation of school advisors and personnel, who may have felt "pressured" to purchase from the school board member because of the power of the school board to hire, terminate, and exert other significant influence over school personnel. See also CEO 75-127, CEO 80-68, CEO 84-50 (Question 2), and CEO 94-16, all of which prohibit the personal solicitation of school district employees by a school board member.

Accordingly, we find that a prohibited conflict of interest would not be created by your employment with a school uniform company that has been designated the "preferred vendor" by many district schools that require uniforms, but if you are elected to the School Board we caution you against personally soliciting school district staff, as well as school-sponsored organizations like uniform committees, parent-teacher organizations, or school advisory committees, to designate your company as the "preferred vendor" for a school's mandatory uniforms.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 16, 2010 and **RENDERED** this 21st day of April, 2010.

Roy Rogers
Chairman

CEO 10-15 – June 9, 2010

CONFLICT OF INTEREST

TEACHER OFFERING SUMMER ART CAMP TO STUDENTS IN HER CLASSES

To: Milagros Mendola, Teacher, Crystal Lake Elementary School (Stuart)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a teacher to offer a summer art camp, for a fee, to students in her school classes.

QUESTION:

Would a prohibited conflict of interest exist were a teacher to offer a summer art camp, for pay and on school grounds, to students assigned to her classes?

Your question is answered in the affirmative .

In the correspondence you have provided, you advise that you are the sole art teacher at an elementary school in Martin County. You state that last year you requested from the District, and received, approval to conduct a summer art camp on school grounds, for which you charge a fee. This year, the District has cautioned you that the Code of Ethics for Public Officers and Employees may be violated if students assigned to your own classes participate in the camp, prompting you to make this inquiry. You relate that you operate as a sole proprietorship and will rent space from the District to conduct the camp, which you refer to as "enrichment and not academic tutoring." You state you will charge a fee, and although the camp is open to children who do not attend your school, you expect the majority of camp attendees to come from your school. At this time, you relate, about 20 children are signed up for the program. You further inquire whether, if we find that having your own students participate in the camp would create a prohibited conflict, the conflict could be negated by your "pairing up" with a teacher from another school, who would teach your students while you teach hers. .

Section 112.313(7), Florida Statutes, provides:

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

The first part of Section 112.313(7) prohibits you from having a contractual relationship with any business entity which is subject to the regulation of, or is doing business with, your agency.

Your situation is comparable to one we examined in CEO 04-17, where we dealt with questions regarding teachers performing engaging in private tutoring[1]. There we found, as we have in other opinions, that a teacher's agency is the school at which he or she is employed, and that even a self-employed person can be a "business entity," given the definition of that term found in Section 112.312(5), Florida Statutes[2]. Similarly, we find here that your agency is the school at which you teach, and that by operating as a sole proprietorship, you have a contractual relationship with a "business entity." However, as was the case in CEO 04-17, while the lease agreement you have with the District constitutes "doing business," your business entity will not be doing business with your agency (the school) but rather will be doing business with the school district. Accordingly, the first part of Section 112.313(7)(a) would not operate to prohibit the proposed summer camp.

The second part of Section 112.313(7)(a) prohibits you from having *any* contractual relationship which would create a continuing or frequently recurring conflict between your private interests and the performance of your public duties, or that would impede the full and faithful discharge of your public duties. This provision establishes an objective standard which requires an examination of the nature and extent of your duties together with a review of your private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982).

In Question 3 of CEO 04-17, we said that a prohibited conflict of interest would be created should a teacher of music, dance, art, or drama also give private lessons, for a fee, to his or her own students, even where such lessons were not remedial in nature.

The requestor of that opinion suggested that permitting teachers of the arts to provide non-remedial "supplemental" tutoring to their own students presented less of a potential for conflict than would exist with respect to other disciplines, because the arts are not tested on statewide achievement tests; thus the motivation for a teacher to teach less effectively at school and thereby create a need for tutoring would be reduced. It was also suggested that because each artist/teacher generally has a particular method, style, artistic emphasis, or talent, teachers in these areas are unique, and if a parent sought extra art or music lessons for his or her child "in order to achieve greater artistic development," the parent may *want* the child to receive that extra instruction "from the specific teacher that already has an artistic relationship with the child and has the particular emphasis, style, or talent involved in the lessons that the student already receives at school."

We rejected these arguments, finding that the fact that the lessons were not remedial in nature did not negate the conflict which would arise under the second part of the statute. We said that while a restriction on remedial instruction,

> may indeed reduce any motivation for a teacher to teach less effectively at school, the teacher's responsibility to be objective in the in-school treatment of his or her students may be compromised when some of the students are also privately taking lessons from that teacher. A teacher who has a private contractual relationship with the parents of some of his or her students may be tempted to demonstrate favoritism to those students in grading, assignment of roles in school performances and events, and other in-class treatment.

We continued,

> where a teacher gives private lessons to some of his or her own students, there is the potential for the teacher's responsibility to treat the child impartially to be impeded by the desire to maintain a harmonious relationship with the child and parents as a private tutor. By this we do not mean to suggest that the teacher would

actually succumb to such temptation and thereby compromise his public duties in favor of his private interests. The statute is entirely preventative in nature.

We cannot discern any substantive difference between the facts you have provided and those of CEO 04-17. That your program is labeled an "enrichment," rather than "non-remedial, supplemental tutoring," and that it is conducted during the summer rather than after school are distinctions that do not address the underlying concern: that where a teacher is privately contracting with the parents of his or her students during the course of the school year, there is the potential for the teacher's responsibility to treat the child impartially to be impeded by the desire to maintain a harmonious and profitable relationship with the child and parents in his or her private endeavor. Nor is this concern obviated by having another teacher instruct your students while you teach hers, because doing so does not remove the potential for disparate treatment of students depending on whether they did or did not sign up for the camp.

Our finding here is consistent with our determinations in analogous circumstances. In CEO 82-39 we found a prohibited conflict of interest would be created were an auditor employed by the Department of Education ("DOE") to teach a course for a school district whose programs she audited. In CEO 94-4 we said that complaint investigators for the Office of Professional Practices Services within the DOE would be prohibited from providing training for local school districts, as the investigators' duty to conduct their investigations with impartiality could be compromised by their concern for satisfying or pleasing their private employers—the school districts employing them to provide training. And in CEO 98-1 we found that a prohibited conflict of interest would be created were a Fire Prevention Specialist employed by the State Fire Marshal's Bureau of Fire Prevention to provide training and seminars for the architects, engineers, and contractors whose work he inspected in his public capacity, as he would be in a position to review and critique the work of the same architects, engineers, electrical contractors, and businesses for which he proposed to conduct his training and seminars.

Accordingly, we find that while you would not be prohibited from operating, for a fee, a summer art camp, a prohibited conflict of interest under Section 112.313(7), Florida Statutes, would be created were you to contract with parents of students who are in your classes to have their children participate in your summer art camp.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 4, 2010 and **RENDERED** this 9th day of June, 2010.

Roy Rogers
Chairman

[1] In fact, your circumstances are quite similar to those raised in Question 4 of that opinion, which we did not answer, because in that instance the question appeared to be wholly hypothetical.

[2] Defining "business entity" as, "any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, *self-employed individual*, or trust, whether fictitiously named or not, doing business in this state." [E.S.]

CEO 12-23 -- December 5, 2012

CONFLICT OF INTEREST

TEACHERS AND COACHES SECONDARILY EMPLOYED TO TUTOR/INSTRUCT STUDENTS AND OFFERING ADDITIONAL PROGRAMS TO STUDENTS

To: Sheryl G. Wood, General Counsel, Palm Beach School Board

SUMMARY:

A public school teacher or coach is not prohibited from privately tutoring or providing supplemental instruction to public school students, or from offering private summer programs to students, provided that the students tutored/instructed or offered the programs are not students in/on the teacher's or coach's classes, group instruction, sports tryouts, or sports team, at the time of the tutoring/instruction or offer.[1] CEO 04-17, CEO 08-15, and CEO 10-15 are referenced.

QUESTION:

Would a prohibited conflict of interest be created were a public school teacher or coach to privately tutor or provide supplemental instruction to public school students, or to offer private summer programs to students?[2]

Your question is answered in the negative, provided that none of the students tutored/instructed or offered programs is a student in/on the teacher's or coach's class, group instruction, sports tryouts, or sports team, at the time of the tutoring/instruction or offer.

In your letter of inquiry, you essentially ask, following on our decisions in CEO 04-17 (teachers engaged in private tutoring activities) and CEO 10-15 (teacher offering summer art camp to students in her classes), whether a prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were a public school teacher or a public school coach (who may or may not also be a teacher) to hold additional employment with entities other than the School District, or with his or her own business, providing instruction outside of the regular school day, or to offer summer programs to students. More particularly, you state that the School District has a variety of programs which provide additional educational services to students outside of the regular programs the District provides as part of its normal mission; that some of the additional services are run by Supplemental Educational Services ("SES") providers, who are paid with federal funds routed through the Florida Department of Education, and then the District, which pays the providers; that the District, in addition to private entities ("third parties"), is a provider; and that student eligibility for the programs is determined with no teacher input or influence. In addition, your inquiry contemplates scenarios including those in which a teacher would hold employment or a contractual relationship with a provider and would tutor students in his or her regular school classes, but in a different subject than the regular class subject, in which the teacher would hold no secondary employment or contractual relationship but, instead, would have his or her regular district paycheck increased as compensation for the tutoring ("extra District job duties"), in which students tutored as part of a secondary employment are not "students of record" in the teacher's class but regarding which the teacher provides educational support during the regular school day (e.g., intensive reading instruction to a group of students during the school day), and in which the students tutored via secondary employment are not students of record, are in such "educational support groups" during the regular school day, but the tutored subject is different than the regular school day group subject. Additionally, you state that the District employs coaches for various sports; that many of the coaches also are teachers; and that such employees are responsible for determining which students can participate on a given School District sports team, via open tryouts. And, you

relate that some of these teacher/coaches, either individually or through an entity under their control, operate camps/programs in the off-season or over the summer, or sponsor sports travel leagues, for which students pay a fee directly to the teacher/coach, or his or her entity, to enroll. Further, your inquiry contemplates scenarios in which the camp/program/league is operated on District school campuses, after regular school hours, and involves the same sport the District pays the person to coach, in which the operation is the same, but conducted off campus, in which the operation is the same, but conducted during the summer, in which the scenario is the same except that the coach works for a business entity he or she does not control, and in which the regular school responsibility sport differs from the camp/program/league sport.

The gravamen of our finding in CEO 04-17 is that a prohibited conflict of interest is created under Section 112.313(7)(a), Florida Statutes,[3] when a teacher tutors for compensation in a secondary employment or contractual relationship capacity students in his or her own school classes, reasoning that such a situation would create a temptation for a teacher to be less than objective toward a given student regarding grading and other public capacity duties held by the teacher toward a student currently in his or her public school teacher capacity charge, due to the student's participation or lack thereof in the teacher's compensated secondary endeavor. In CEO 10-15, we followed that same reasoning in finding that a teacher should not offer, or enter into agreements with students/their parents regarding, a summer art camp to students while the students were in her classes (while the students were subject to her grading and other public capacity responsibility or "not yet out for the summer"); however, we did not find that the teacher could not operate the camp at all or sign up students after the school year ended. Implicit in both CEO 04-17 and CEO 10-15 is our recognition that the conflicts found are based on a teacher (public school district employee) having public capacity power or duties regarding a student at the same time that the teacher seeks to do secondary business with the student (or parents) or engages in secondary employment tutoring or instructing the student.

Thus, regarding the situation you present, in its various nuanced possible incarnations, we find that a teacher, a teacher/coach, or a coach can work secondarily tutoring or providing instruction (e.g., extra math tutoring or extra pitching coaching) to students, provided that the students are not in his or her class, in his or her group instruction, in his or her sports tryouts, or on his or her sports team at the time of the instruction; find that he or she can work secondarily in camps/programs/leagues, provided that the students are not in his or her class, in his or her group instruction, in his or her sports tryouts, or on his or her sports team at the time of the camps/programs/leagues; and find that he or she can offer, and can sign students/parents up for, camps/programs/leagues, provided that the offer or sign up occurs during the summer (after the school year ends) or at other times when the student is not in his or her class, in his or her group instruction, in his or her sports tryouts, or on his or her sports team.[4]

Your inquiry is answered accordingly.[5]

ORDERED by the State of Florida Commission on Ethics meeting in public session on November 30, 2012 and **RENDERED** this 5th day of December, 2012.

Susan Horovitz Maurer, *Chair*

[1]Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]Your inquiry, which asks several questions, has been consolidated into one question, with no intent on our part to alter the substance of the issues presented.

[3]Section 112.313(7)(a) provides:

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

interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

[4]As to the variant of the scenario in which the teacher, coach, or teacher/coach holds no secondary employment or contractual relationship, but, rather, is paid extra in their public school employment position for extra duties, we find no prohibited conflict under Section 112.313(7)(a), even if the students tutored or instructed are in/on the employee's public school classes, group instruction, sports tryouts, or sports team. An essential element for a finding of conflict under this statute is that a public employee holds some employment or some contractual relationship in addition to his or her public employment. See, for example, CEO 08-15 (health facilities authority executive director providing additional services to authority).

[5]Your inquiry also mentions Section 112.313(6), Florida Statutes, which prohibits corrupt use or attempted use of a public employee's public position. Rarely do we provide advice regarding this statute, inasmuch as it applicability depends on detailed facts typically not susceptible to being provided in the context of a request for an opinion. However, it is obvious that no School District employee should actually use or attempt to use his or her public position or power in a corrupt manner, in furtherance of tutoring/instruction/camps/programs/leagues or otherwise.

CEO 13-13 - September 18, 2013

CONFLICT OF INTEREST; VOTING CONFLICT

AIRPORT AUTHORITY COMMISSIONER DONATING RIGHT TO PURCHASE PROPERTY TO AIRPORT AUTHORITY

To: Name withheld at person's request

SUMMARY:

No prohibited conflict of interest would be created under Sections 112.313(3) and 113.313(7)(a), Florida Statutes, were an airport authority commissioner who privately contracted to purchase a parcel of property located near the airport to donate his right to purchase the parcel to the airport authority. The commissioner would not be selling real property to his agency-he would be donating the right to purchase the property to the airport authority. His transfer of the right to purchase the property also would not create a prohibited contractual relationship. The commissioner is advised to abstain from voting on the matter and to fully comply with Section 112.3143, Florida Statutes, when it comes before the airport authority, as the airport authority's decision regarding the donation would inure to his economic benefit or loss. CEO 82-15, CEO 82-31, CEO 90-49, and CEO 96-31 are referenced.

QUESTION:

Would a prohibited conflict of interest be created were an airport authority commissioner to donate the right to purchase a parcel of property to the airport authority where he has entered into a contract to purchase the property for himself?

Under the particular circumstances of this inquiry, your question is answered in the negative.

Through your letter of inquiry and correspondence with our staff, we are advised that you serve as the General Counsel to the Sarasota Manatee Airport Authority, and have been authorized to seek this opinion on behalf of . . ., a member of the Airport Authority's governing board from Manatee County. You relate that the Commissioner is an experienced and successful homebuilder and developer in the two-county area where the airport is located, and that in December 2012, he personally contracted to purchase 84 acres of industrially-zoned property about a half-mile from the end of one of the airport's runways. The purchase price for the property was $2.3 million and the Commissioner paid a $125,000 deposit, which, under the terms of the contract, gave him six months to decide whether to close on the property. If he chose not to go forward with the purchase, his $125,000 deposit would be returned in full.

During the six-month period, he approached the Airport Authority's president/chief executive officer and inquired whether the Airport Authority might be interested in the property if he donated the purchase rights under the contract to the Airport Authority. The Airport Authority president had the property appraised and the appraisal reflected a fair market value of $2.6 million, which was communicated to the Commissioner. As the initial six-month period came to an end, the Commissioner negotiated a still lower price of $1.8 million with the seller, but in exchange for the lowered price, the Commissioner agreed to a closing date of October 14, 2013, and although the amount of his deposit was reduced to $100,000, it would be forfeited if the sale did not close. The Commissioner would like to assign his purchase rights to the Airport Authority as long as the transaction would not violate the Code of Ethics. It is contemplated that if the Airport Authority decides to go forward with the purchase, the Airport Authority would pay $100,000 to the closing agent and the Commissioner's $100,000 deposit would be returned to him.

The applicable provisions of the Code of Ethics are as follows:

> 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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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.
> [Section 112.313(3), Florida Statutes.

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.-No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.
> [Section 112.313(7)(a), Florida Statutes.]

Section 112.313(3) prohibits a public officer from acting in his private capacity to sell property to his own agency. However, Section 112.313(3) is not applicable here because the Commissioner would not be selling property to the Airport Authority. Instead, he would be donating his right to purchase a parcel to the Airport Authority. In CEO 82-15, we opined that this provision did not apply where a county commissioner donated a tract of land to the county. This opinion was also cited in CEO 90-49, where a county commissioner donated land for a road right-of-way to the county. Based on this precedent, we do not believe that the Commissioner's donation of his right to purchase the property to the Airport Authority would violate Section 112.313(3), Florida Statutes.

Section 112.313(7)(a) prohibits the Commissioner from having a contractual relationship with a business entity that is doing business with his agency. It also prohibits contractual relationships which create continuing or frequently recurring conflicts of interest, or which impede the full and faithful discharge of public duties.

We do not find this provision to bar the donation, either. Under the first part of Section 112.313(7)(a), while in a strict sense it might be said that the Commissioner would hold a contractual relationship with a business entity (his company or his proprietorship) doing business with the Airport Authority (his public agency) by virtue of the mutual obligations of the donation, we find that, in this particular situation, any concerns are obviated by Section 112.316, Florida Statutes, which provides:

> It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or

> following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

And, similarly, under the second part of the statute, we do not see a frequently recurring conflict or an impediment to the full and faithful discharge of the Commissioner's public duties.

You have asked us to advise whether the voting conflict statute requires the Commissioner to abstain from the Airport Authority's decision to accept the assignment of his purchase rights. Section 112.3143(3)(a), Florida Statutes, provides:

> 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.

You have advised that if the Airport Authority declines the assignment of the right to purchase the property, the Commissioner would have the option of offering the opportunity to another entity, going forward with the purchase himself, or forfeiting his $100,000 deposit. In CEO 96-31, we advised a city councilman that he should abstain from voting to assign a leasehold interest in a city-owned marina to a company in which he owned a substantial interest. In that situation, we concluded that the city's approval of the lease assignment would inure to the special gain or loss of the assignee company in which the city councilman owned a substantial interest. In CEO 82-31, we opined that a water control district board member should abstain from voting to accept a donation of land to the district from the board member's employer since his employer stood to specially benefit from the donation. Although the Commissioner's situation differs from these two opinions, we believe that he should abstain from voting as a member of the Airport Authority to accept the assignment of his rights to purchase the property. The Commissioner's $100,000 deposit will be returned to him if the Airport Authority accepts the assignment, and will not if it does not. Earlier this year, the Florida Legislature amended the voting conflict law to define the term "special private gain or loss." Section 112.3143(1)(d), Florida Statutes (2013) (Chapter 2013-36, Section 6, Laws of Florida), now provides:

> "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.

Although this new provision is no different from the Commission's long-standing interpretation of the voting conflicts law, we do believe that the Commissioner would experience a special private gain or loss from the Airport Authority's decision to accept the assignment of his rights to purchase the property. Therefore, he should abstain from voting, announce the reason for his abstention, and file the voting conflict form (CE Form 8B) with the person responsible for keeping the Airport Authority's minutes within 15 days of the vote.

Accordingly, we find that no prohibited conflict of interest would be created were the Airport Authority to accept the Commissioner's assignment of his rights to purchase the 84-acre parcel of property located approximately one-half mile from an airport runway, but that the Commissioner should abstain from voting on the matter.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 13, 2013, and **RENDERED** this 18th day of September, 2013.

_____

Morgan R. Bentley, *Chair*

CEO 13-16 - October 30, 2013

CONFLICT OF INTEREST

CITY POLICE OFFICER CONDUCTING SURVEILLANCE OF UNFAITHFUL SPOUSES AND EMPLOYEES STEALING FROM BUSINESSES

To: Name withheld at person's request (Miami Gardens)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were a municipal police officer to own and operate a private investigative firm which, in part, conducts surveillance in "unfaithful spouse" cases. Although it does not appear that this type of case will require the officer to access confidential information available in his capacity as a police officer, it is possible that these cases could influence criminal investigations in which the officer might become involved. Moreover, a prohibited conflict of interest will also exist were the officer's firm to conduct surveillance of employees suspected of stealing from their businesses. Because the officer has access to confidential information that may prove valuable to the client in such cases, agreeing to conduct this type of surveillance will create a continuing or frequently recurring conflict of interest. Referenced are CEOs 08-16, 98-10, 97-13, 96-16, 92-48, 91-34, 89-02, and 81-76.

QUESTION:

Would a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, were you, a municipal police officer, to own and operate a private investigation firm which will be conducting targeted surveillance of "unfaithful spouses" and employees suspected of stealing from their businesses?

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

In your letter of inquiry and additional information provided via email exchanges between you and our staff, we are advised that you seek to own and operate a private security and investigative firm while remaining employed as a certified police officer within the State of Florida. You emphasize you will not be personally performing any private investigative work, but will be employing other individuals to perform those services.

You indicate that part of the investigative services which your firm plans to perform involves surveillance of allegedly unfaithful spouses, as well as surveillance of employees suspected by their employers of stealing from their businesses. Regarding these surveillance activities, you state there would be no need to check the background or history of the subject using confidential information accessible to you as a police officer. Rather, you indicate your investigators would obtain all the information required from the clients, including information on each subject's location, place of employment, phone number, and home address.[1] You state the investigators would then observe the subjects and report any findings to the clients. You also indicate your firm will not conduct any surveillance activities in the City where you are employed as a police officer. Given this context, you inquire whether you would face a prohibited conflict of interest under any provision of the Code of Ethics if your firm conducts these types of surveillances.

Initially, we emphasize that the following analysis only pertains to whether conducting these surveillances will violate provisions in the Code of Ethics. Please note that rules or policies of your municipal police department, statutes outside of the Code of Ethics, or other applicable law outside of our jurisdiction may also affect, limit, or prohibit these surveillance activities. However, irrespective of the application of other such

laws or policies, we find that conducting these types of surveillances would create a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes.

Section 112.313(7)(a), provides:

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

It does not appear that a prohibited conflict of interest will arise under the first part of the statute because the facts as indicated by you show that your firm will not be doing business with the City where you are employed; nor is there any indication that you will be regulated by the City. Under the second part of the statute, a public officer or employee-such as a police officer-is prohibited from having any employment or contractual relationships which would create a continuing or frequently recurring conflict of interest or which would impede the full and faithful discharge of his or her public duties. We are of the opinion that you will be faced with a conflict under this portion of Section 112.313(7)(a) if your firm conducts surveillance on either "unfaithful spouses" or employees suspected of theft, despite the limitations which you intend to place upon the work.

In the past, when considering whether a public officer will have a conflict of interest under the second part of Section 112.313(7)(a), we have cited Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), which states a conflict of interest is created when a public officer's duties coincide with his private employment "to create a situation which 'tempts dishonor.'" See, generally, CEO 98-10. Our precedent has found at least two types of situations where a police officer's secondary employment would create such temptation.

First, we have recognized temptation when a police officer's secondary employment could incite him to obtain and use nonpublic information for the benefit of a private employer. See CEO 91-34. This temptation arises when: (1) the law enforcement officer has access in his or her public capacity to information not available to the general public; and (2) the information could provide a benefit to the law enforcement officer or a private employer (e.g., a client) in a private endeavor. See CEOs 96-16 and 91-34. The concern in such situations is whether the private interests of the law enforcement officer will be contrary to his or her public duties, thereby "tempting dishonor," rather than with whether the officer, through self-imposed restrictions, can avoid succumbing to the temptation of using public resources for his or her private benefit. See CEOs 98-10 and 89-02.

However, our precedent has found this temptation can be alleviated so long as the confidential information relevant to the officer's secondary employment may be learned from a separate, publicly available source. For example, in CEO 96-16, we determined that no conflict of interest would be created if a municipal police officer conducted private surveillance of workers' compensation claimants for an insurer, because in that situation, any investigatory information that could be accessed via police department sources would be obtained via a private, on-line service. We concluded the public/commercial availability of this information removed any temptation for the officer to access information from his police department, and, therefore, alleviated any conflict of interest under the second part of Section 112.313(7)(a). See, also, CEO 08-16 (police officer could own and operate a business locating items of property on behalf of lending institutions so long as the information required for such work was obtained from private, on-line sources, lender sources, or other non-law-enforcement sources); CEO 97-13 (police officer seeking secondary employment as process server would have no conflict of interest as the information needed to locate the individual to be served would be obtained from a private source, negating any need for the officer to access the information via his public position).

Turning to the second type of situation, we have recognized that an officer "tempts dishonor" when his private, secondary employment could influence activities that he may be called upon to perform in his public capacity. In such instances, we have recognized a conflict of interest as the officer's private activities may influence how he performs his public responsibilities. Weighing such concerns has required us to look at the nature and subject matter of the type of private investigative activity in question. If the particular activity

involved was likely to influence the officer's public responsibilities, we found it would constitute a conflict of interest for the purposes of Section 112.313(7)(a).

For example, in CEO 91-34, we addressed a situation where a municipal police chief inquired whether he could investigate-in his private capacity-various "slip and fall" cases for cruise lines. We found this type of investigation presented no conflict of interest under Section 11.2313(7)(a), although we cautioned the police chief about accepting employment regarding other subject matters:

> [W]e do not believe that these "slip and fall" type investigations could have any influence upon any actions taken or investigations undertaken by you in your public capacity. We do caution you, however, against accepting any cases involving investigations of intentional maritime torts such as sexual assault or any other matter which would be a crime if committed in Florida.
>
> In such cases your access to confidential information would be of value to the cruise line. A conflict could also exist between your private responsibilities to the cruise line and your public duties by virtue of the extension of Florida's special maritime criminal jurisdiction under certain limited circumstances pursuant to Section 910.006, Florida Statutes.

Therefore, the nature and subject matter of the officer's secondary employment is critical and must be carefully considered. CEO 91-34 is but one example of situations where we have considered the subject matter of a particular investigative activity when determining whether it would "tempt dishonor" for an officer to conduct it. See, for example, CEO 98-10 (conflict of interest would be created for the commander of a municipal police department to accept secondary employment as director of security at a private college because the frequent interface between the police department and campus security could influence or compromise the commander's public duties); and CEO 89-02 (conflict of interest would be created if a police officer accepted outside employment providing accident reconstruction and consultation services to insurers and attorneys because, in part, the officer might be called upon to investigate the same accidents in his public capacity).[2]

To summarize, when determining if a particular type of investigative activity will "tempt" an officer's dishonor-thereby creating a conflict of interest under the second part of Section 112.313(7)(a)-we must consider: (1) whether the officer by virtue of his public position has access to confidential information which could provide a benefit to his private employer; and (2) whether the nature and subject matter of the secondary employment could influence the officer's performance of his public duties. Given these criteria, it appears a conflict of interest may arise if your investigative firm conducts either of the surveillance activities which you propose.

Considering the surveillance regarding alleged spousal infidelity, you indicate such surveillance will not require your firm to access any confidential information available in your status as a police officer. You indicate your investigators can gather all information required to conduct such surveillances directly from your clients. In this respect, your firm's surveillance of alleged spousal infidelity is akin to the surveillance of workers' compensation claimants as addressed in CEO 96-16. As previously discussed, we found in CEO 96-16 that no conflict of interest was presented as any confidential information necessary to conduct the surveillance was publicly available from an outside source.[3]

However, given the subject matter involved, your firm's surveillance of allegedly unfaithful spouses could coincide with your public responsibilities as a law enforcement officer. Isolated instances of illicit sexual activity are not considered crimes under the State's adultery statute. See Purvis v. State, 377 So. 2d 674, 676 (Fla. 1979). Still, it is not unreasonable to assume that, in certain instances, the discovery of marital infidelity may lead to actions which could be the subject of criminal investigations (e.g., aggravated battery, manslaughter, and even homicide). While you indicate that your firm's surveillances of alleged spousal infidelity-and, therefore, any subsequent police investigations-would not occur in your municipality, your participation likely would be required if any such investigation were to arise. Your cooperation in such investigations-which is your public responsibility as a police officer-may or may not be in keeping with the wishes of the private employer who hired your firm for such surveillances, and we can envision circumstances where the two would diverge. Therefore, because the possibility exists that this type of surveillance could coincide with and influence your

public responsibilities, we find a prohibited conflict of interest would be created under Section 112.313(7)(a) for your firm to engage in private surveillance of allegedly unfaithful spouses.

Considering the proposed surveillance of employees suspected of stealing from their businesses, we also find a conflict of interest under Section 112.313(7)(a). Although you emphasize this type of surveillance does not require consulting the confidential information available to you as a police officer, the subject matter of such investigations involves potential criminal activity, and, therefore, your access to confidential information could be of benefit to your employer. Moreover, we can envision situations where your public responsibility as a police officer to cooperate in a criminal investigation concerning the suspected theft could conflict with the wishes of your employer, thereby creating tension between your private employment and your public responsibilities. Therefore, we find your firm's surveillance of suspected employee theft would also create a prohibited conflict of interest under Section 112.313(7)(a).[4]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 25, 2013, and **RENDERED** this 30th day of October, 2013.

Morgan R. Bentley, Chairman

[1] You also emphasize that, prior to accepting this type of surveillance work, you will require your clients to sign and initial a form indicating an understanding that, in the event a background check is required, it will be conducted based only upon publicly-accessible information or information from a paid commercial source

[2]It may be argued that the Commission on Ethics is not the agency best suited to deciding which types of investigative activities are likely to influence an officer's public responsibilities. However, to ignore this consideration means the only factor left for us to weigh is whether the officer will be tempted to access confidential information available to him in his status as a law enforcement officer. Given the increasing volume of online information, we are fast approaching a point where an officer may claim that all useful law-enforcement-related information may be obtained from publicly available on-line sources, thereby avoiding all conflict of interest concerns. See, for example, 96-16. This would enable an officer to accept private employment even if there is the chance that such employment may influence his public duties. For this reason, it is essential for us to continue to consider the subject matter of each investigative activity in question to determine whether it could coincide with the officer's public duties.

[3]We recognize that even if a police officer assures us that he will only obtain such information from a separate and publicly available source, the more expedient option for that officer may still be to simply access the information via his public capacity. Such actions likely would constitute a misuse of the officer's public position under Section 112.313(6), Florida Statutes. However, in past opinions, we have declined to presume that an officer would misuse his position in such a manner when evaluating if a conflict of interest exists under Section 112.313(7)(a). See CEOs 96-16, footnote 4, and 92-48.

[4]In reaching this decision, we do not imply that you would intentionally misuse your public position or the resources available to you as a public officer. We simply are finding that-in surveillances involving allegedly unfaithful spouses or employees allegedly stealing from their businesses-you will be placed in a situation which could "tempt dishonor." Section 112.313(7)(a) is prophylactic in nature, and as we stated in CEO 81-76, is intended to prevent situations in which private economic considerations may override the faithful discharge of public responsibilities.

CEO 13-21 - December 18, 2013

CONFLICT OF INTEREST

TEACHER SECONDARILY EMPLOYED PROVIDING PROGRAMS TO STUDENTS

To: Name withheld at person's request (Palm Beach County)

SUMMARY:

A prohibited conflict of interest exists where a public school teacher/support facilitator/department chair provides services to students of his public school via his private capacity, paid therapy and counseling. However, a prohibited conflict will not exist where the person provides the services as part of his public school employment. CEOs 12-23, 10-15, and 04-17 are referenced.[1]

QUESTION:

Does a prohibited conflict of interest exist where a public school teacher, support facilitator, and middle school department chair conducts an after-school therapeutic social skills program for students, where the program includes students of the teacher's school?

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

In your letter, you write that you inquire in behalf of the School Board of Palm Beach County and with the permission of . . .(teacher), who serves as a middle school teacher for ESE (exceptional student education) students, an ESE support facilitator, and an ESE department chair for his middle school.[2] In addition, you state that the teacher is the founder, president, and fifty percent shareholder of a for-profit corporation which provides an after-school social skills program (fee-based)[3] for autism spectrum students, and that the program includes students who are in the teacher's ESE elective public school class or who attend the same school where the teacher teaches, but who are not in his class. More particularly, regarding the program, you relate that it meets once a week for an hour and includes 29 students between the ages of 6-14, that students in the program from schools other than the teacher's school are referred to the program through community resources, including parents, mental health care providers, and a center for autism and related disorders, that there are few professionals in the Palm Beach County area with the requisite training and experience to design and implement a therapeutic social skills program for these children and their families, and that to the teacher's knowledge his company is the only group of its kind for elementary and middle school aged children in the County, with some children traveling two hours, one way, to participate. Further, you state that there are only five children in the program who attend the middle school (a "lottery only" middle school) where the teacher teaches, that only three of the five are in classes taught by the teacher or regarding which he is a support facilitator, and that all five were involved in the program since they were in elementary school, long before they applied to the middle school, and that neither the teacher nor his company will directly promote the program to any of the students who attend the middle school, or to their parents. Also, you state that the program services provided to students by the teacher and his corporation amount to therapy and counseling, not teaching or tutoring.

Section 112.313(7)(a), Florida Statutes, is at issue regarding your inquiry. It provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.-No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor

> shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

In CEO 12-23 (teachers and coaches secondarily employed to tutor/instruct students and offering additional programs to students) and other decisions,[4] we have found that a prohibited conflict of interest would be created under the statute were a teacher or other public school employee to work privately with students in his public charge, or to seek to engage students in his public charge (or their parents) to sign up for programs of his which would take place after the students ceased to be in his public charge, reasoning that he would be tempted to conduct himself less than objectively in his public capacity toward students, depending on whether they were part of his private work or signed up for his later programs.

We find that the instant inquiry is no different, and that a prohibited conflict exists where students of the teacher's school[5] are in his corporation's program. The same temptation to a lack of objectivity is present.[6]

However, we also find that a prohibited conflict of interest will not exist were the School District to provide the program services and the teacher, as an additional part of his public capacity duties and for additional public sector pay, to deliver the services, instead of through his private corporation. CEO 12-23, note 4. In making this finding, we recognize the value of the services being provided and acknowledge their significance to the more complete education of special needs children, realizing that the services often cannot be provided in close proximity to a student's location.

Accordingly, we find that a prohibited conflict of interest exist where students from the teacher's school also are in a program of his corporation; but that a prohibited conflict will not exist if the teacher performs the additional services for the students as part of his public school employment.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 13, 2013, and **RENDERED** this 18th day of December, 2013.

Morgan R. Bentley, Chairman

[1] Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2] The teacher teaches only at one school (a middle school), he teaches two ESE classes, is a support facilitator in three classes, and is a case manager for approximately twenty students. As a support facilitator, he provides ESE services to students with disabilities in mainstream classes and ensures compliance with their Individual Education Plans (IEPs); however, he is not the primary classroom teacher in these classes, but is an equal partner in instruction of these students, their grading, parent communication, and lesson planning. As his school's ESE department chair, the teacher acts as a liaison between the school's administration and its ESE teachers, and works with classroom teachers to identify and solve problems relating to their students with disabilities.

[3] The teacher personally provides therapeutic services during the corporation's program sessions and is paid by the corporation; parents pay the corporation, per session, for their child's participation in the program; and parents are asked to complete a registration form for each session.

[4] CEO 10-15 (teacher offering summer art camp to students in her classes); CEO 04-17 (teachers engaged in private tutoring activities).

[5] In the prior decisions, the temptation to a lack of objectivity was grounded in students being in a teacher or coach's class, on his sports team, or in his group instruction. In the instant matter, we find that this temptation extends to all students in the teacher's middle school, given the breadth of his several ESE roles at the school.

[6] We have not overlooked the distinction you make between teaching or tutoring and therapy or counseling. However, we do not believe that the distinction is material to the teacher's situation, given that the gravamen of our finding is private employment intersecting public responsibility, a dynamic present regardless of the type or characterization of the private, paid service delivered.

CEO 14-21 - July 30, 2014

CONFLICT OF INTEREST; VOTING CONFLICT

SCHOOL BOARD MEMBER
EMPLOYED BY NON-PROFIT LITERACY FOUNDATION

To: Name withheld at person's request (Fort Lauderdale)

SUMMARY:

A prohibited conflict of interest would not be created under Section 112.313(7)(a), Florida Statutes, by a school board member's employment with a literacy foundation where the foundation has no contract with her board/district and the board member performs no duties related to recruitment of teachers in her district for compensated positions with the foundation. However, the board member would be required, under Section 112.3143(3)(a), Florida Statutes, to abstain from voting on measures related to a board/district contract with the literacy foundation. CEO 10-3 and CEO 10-16 are referenced.

QUESTION 1:

Would the Code of Ethics prohibit a school board member's operation of a reading mentors program, as part of her employment with a literacy foundation, where the reading mentors program includes recruitment of teachers for contractual positions with the foundation?

Question 1 is answered in the negative, as long as the board member does not operate the reading mentors program within the school district where she is a board member.

By your letter of inquiry and telephone communications with our staff, you relate that this opinion is sought on behalf of a member of a school board ("Board Member") who was recently appointed by the Governor to fill a vacancy on the board and was sworn into office on March 11, 2014. You inquire about the Board Member's current private capacity employment situation and whether it creates a prohibited conflict of interest and also whether a voting conflict would exist if she were to vote on a measure related to a prospective contract between her Board/District and her private employer. We have combined your several questions about her employment situation into Questions 1, 2, and 3, which we will address first.

You relate that the Board Member is presently employed by a literacy foundation ("Foundation"), a non-profit, tax-exempt corporation, where the Board Member serves as Regional Program Manager. You ask whether a prohibited conflict of interest would exist if the Board Member were to continue in her present duties with the Foundation, which include making presentations concerning a reading mentors program to teachers who serve as faculty advisors to Future Educators of America ("FEA") chapters within school districts in several counties, including the district where she serves as a Board Member. In this Foundation-sponsored reading mentors program, district students who are members of FEA serve as reading mentors for other students. You state that the Board Member's presentation includes offering to FEA faculty advisors an opportunity to become Program Advisors under contracts with the Foundation. You relate that, under these contracts, the Foundation directly pays Program Advisors a stipend of $1000 per school year, with no Foundation funds passing through a school district to the Program Advisors. You state that the Board Member also has duties with the Foundation related to a family literacy program, which provides grants to entities other than Florida school districts. You explain that there is presently no contract between the Foundation and the Board Member's Board/District and that the Board Member's compensation in her position with the Foundation comes entirely from sources other than her Board/District. You also relate that the Foundation is considering altering these circumstances to require school districts participating in the reading mentors program to contract with the Foundation and to make payments directly to their participating Program Advisors.

This question implicates Section 112.313(7)(a), Florida Statutes,[1] which states:

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

The first part of Section 112.313(7)(a) prohibits a school board member from having an employment or contractual relationship with a business entity or agency that is doing business with or regulated by her agency. The second clause of Section 112.313(7)(a) prohibits employment or contractual relationships which would create continuing or frequently recurring conflicts between private interests and the performance of public duties, or which impede the full and faithful discharge of public duties.

There is no indication that the Board/District, which is the Board Member's agency,[2] presently regulates the Foundation or does business with Foundation. Therefore, the first part of Section 112.313(7)(a), Florida Statutes, would not apply to the situation presented in Question 1. Thus, the question is whether the Board Member's work with the Foundation's reading mentors program, including teacher recruitment for Foundation contracts, would create a continuing or frequently recurring conflict between her private interests and the performance of her public (Board/District) duties or would impede the full and faithful discharge of her public duties. You state that the Board Member's duties with the Foundation include recruiting teachers employed by the Board/District to work for the Foundation as independent contractors receiving stipends from the Foundation. If the Board Member were to engage in teacher recruitment within the District where she is a Board Member, we find that a prohibited conflict would exist under the second part of Section 112.313(7)(a) between her private interest as to the Foundation position and her public capacity position as a member of the Board. In such a situation, she could be tempted to act less than objectively toward teachers in her District depending on whether or not they worked for the Foundation. However, if the Board Member were to operate the reading mentors program, including teacher recruitment, in districts other than her District, the scenario would create no inherent conflict. Therefore, we find that the Board Member's employment duties as to teacher recruitment for the reading mentors program would create no prohibited conflict under Section 112.313(7)(a), as long she performs such duties outside the District where she is a Board Member.

Question 1 is answered accordingly.

QUESTION 2:

> Would the Code of Ethics prohibit the Board Member's operation of a reading mentors program, as part of her employment with a literacy foundation, where the program includes recruitment of Board/District teachers for positions as Program Advisors with the foundation, if the Board/District were to enter into a contract with the Foundation for participation in the Program?

Question 2 is answered in the negative, as long as the Board Member does not operate the reading mentors program within the School District where she is a Board Member.

You state that a prospective contract contemplated by the Foundation would require the Board Member's Board/District to provide access, facility space, and training to Foundation participants; appoint district personnel to be responsible for data collection and reporting to the Foundation; perform specified deliverables to the Foundation; distribute the Foundation's monetary stipends to participating District personnel; and provide indemnity and insurance coverage for the Foundation. If the Board/District were to enter into such contract with the Foundation, the Board/District would be doing business with the Foundation. Under the first part of Section 112.313(7)(a), as explained above in Question 1, any contract between the Foundation and the Board/District would create a prohibited conflict for the Board Member under Section 112.313(7)(a) unless an exemption is

applicable. Because the contract is not contemplated to be awarded under a system of sealed, competitive bids, the exemption under Section 112.313(12)(b) would not apply. Another potential exemption is in Section 112.313(15), Florida Statutes, which provides:

> ADDITIONAL EXEMPTION.--No elected public officer shall be held in violation of subsection (7) if the officer maintains an employment relationship with an entity which is currently a tax-exempt organization under s. 501(c) of the Internal Revenue Code and which contracts with or otherwise enters into a business relationship with the officer's agency and:
>
> (a) The officer's employment is not directly or indirectly compensated as a result of such contract or business relationship;
> (b) The officer has in no way participated in the agency's decision to contract or to enter into the business relationship with his or her employer, whether by participating in discussion at the meeting, by communicating with officers or employees of the agency, or otherwise; and
> (c) The officer abstains from voting on any matter which may come before the agency involving the officer's employer, publicly states to the assembly the nature of the officer's interest in the matter from which he or she is abstaining, and files a written memorandum as provided in s. 112.3143.

The Foundation is a non-profit, tax-exempt, section 501(c) organization, as required to meet the exemption and, further, you state that the Board Member's employment would not be directly or indirectly compensated as a result of the prospective contract and that the Board Member has not participated or voted and will not participate or vote regarding a Board/District decision to contract with the Foundation. Thus, there would be no apparent conflict under the first part of Section 112.313(7)(a) because we find that the Board Member's situation, if the prospective contract were in place and the Board/District were doing business with the Foundation, would meet the exemption in Section 112.313(15), which expressly exempts a public officer from the first part of Section 112.313(7)(a) insofar as the officer's private capacity employment entity contracts with or otherwise engages in a business relationship with the officer's agency. CEO 10-16.

However, because the first part of Section 112.313(7)(a) concerns only the "regulation of" and "doing business with" aspects of an employment or contractual relationship, we still must consider whether the Board Member's employment with the Foundation would create a prohibited conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes, i.e., a continuing or frequently recurring conflict or an impediment to the full and faithful discharge of her duties as a member of the Board, if the prospective contract were in place. In CEO 10-3, we analyzed a school board candidate's employment situation and found that, even if all the requirements for exemption under Section 112.313(15) were met, the candidate still would have a conflict under the second part of Section 112.313(7)(a), if she were to be elected to a school board position, because as a program director she directed the work of a non-profit business and education alliance on behalf of her employer and the duties of her private capacity position would create a prohibited overlap with her public position. Similarly, we find here, as we did in Question 1 above, that the Board Member's recruitment of teachers employed by her Board/District for compensated positions with the Foundation would create a prohibited overlap with her public duties as a member of the School Board and thus would be a conflict of interest under the second part of Section 112.313(7)(a).

As to the Board Member's employment as Regional Program Manager for the reading mentors program with the Foundation in school districts other than the one in which she serves as a Board Member, the same analysis would apply. The Board Member would be exempt from the first part of Section 112.313(7)(a) by operation of the exemption in Section 112.313(15), as stated above. However, the second part of Section 112.313(7)(a) would not apply in that scenario because the Board Member would not recruit teachers to receive Foundation compensation who also were employed by her Board/District. Therefore, we find that no conflict of interest would exist if the Board Member were to be employed by the Foundation as Regional Program Manager for the reading mentors program in school districts other than her District.

Question 2 is answered accordingly.

QUESTION 3:

Would the Code of Ethics prohibit the Board Member's operation of a family literacy program as part of her employment with the Foundation?

Question 3 is answered in the negative.

You state that the Foundation conducts a family literacy program through Foundation grants to support adult education and early childhood literacy programs conducted by community-based organizations. You relate that the Board Member's role in the family literacy program is to provide technical assistance for grant recipients and to collect data from grantees. You state that none of the Foundation's current or anticipated family literacy grants involve the Board Member's Board/District or any Florida school board or district.

There is no indication that the Board Member's Board/District presently regulates the Foundation or does business with Foundation. Therefore, the first part of Section 112.313(7)(a), Florida Statutes, would not apply to the scenario presented in Question 3, absent a contract between the Board/District and the Foundation. If the Foundation and the Board/District were to enter into a contract, the exemption in Section 112.313(15), as analyzed above in Question 2, would apply to exempt the Board Member from a conflict under the first part of Section 112.313(7)(a). As long as none of the family literacy grants or activities occur within the Board Member's District, we find that no conflict would be created under the second part of Section 112.313(7)(a) concerning the Board Member's work with the Foundation as to the family literacy program, whether or not the Board/District enters into a contract with the Foundation.

Question 3 is answered accordingly.

QUESTION 4:

Would the voting conflicts law prohibit the Board Member from voting on measures before the Board related to a potential contract between the Board/District and the Foundation?

Question 4 is answered in the affirmative.

The statutory provision implicated here is Section 112.3143(3)(a), Florida Statutes, which provides:

> VOTING CONFLICTS.--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.

The voting conflicts law, applicable to local, elective public officers, comes into play in a situation in which the vote/measure would cause special private gain or loss to the voting officer personally, the officer's principal (e.g., the officer's employer, client of the officer's firm), the officer's business associate, the officer's relative (e.g., spouse), or certain other persons or entities listed in the statute.

Under the facts you have presented, a vote on a measure to approve a contract between the Board/District and the Foundation would create a special private gain for the Foundation, which is the Board Member's principal (employer). Therefore, we find that the Board Member would be required to abstain from the vote(s).

Further, the Board Member would be required to publicly state to the Board the nature of her interest in any measure(s) concerning the Foundation, and, within 15 days after the relevant vote(s), to file a memorandum (CE Form 8B) disclosing the nature of her interest in the relevant vote(s)/measure(s).

Question 4 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 25, 2014, and **RENDERED** this 30th day of July, 2014.

_____

Linda McKee Robison, Chair

[1]Section 112.313(3), Florida Statutes (Doing Business With One's Agency), does not apply to the Board Member's situation because, under the facts you have presented, the Board Member is not an officer, partner, director, or proprietor of the Foundation and otherwise is not acting in her private capacity with the Foundation to sell Foundation services to the Board/District.

[2]The Code of Ethics in Section 112.312, Florida Statutes, defines "agency" as "any state, regional, county, local, or municipal government entity of this state."

CEO 14-27 – December 17, 2014

CONFLICT OF INTEREST

SCHOOL BOARD MEMBER'S COMPANY CONTRACTING TO PROVIDE PRIVATE TUTORING AND EXTRACURRICULAR TRAINING TO STUDENTS

To: Name withheld at person's request (Stuart)

SUMMARY:

A district school board member will have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if her company engages teachers from her own school district to provide tutoring services, or if the services are provided to students of her own district; and the board member will have a prohibited conflict of interest under Section 112.313(7)(a) if her company provides science, technology, engineering, and math (STEM) training, using teachers from her own district or to students of her own district. Referenced are CEO 14-21, CEO 14-2, CEO 13-21, CEO 13-19, CEO 09-3, CEO 08-7, CEO 07-2, CEO 97-17, CEO 94-37, CEO 88-43, and CEO 81-47.

QUESTION 1:

Will a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, if a company owned by a school board member hires school district teachers to provide private tutoring services to district students, or provides tutoring services to school district students?

Question 1 is answered in the affirmative.

Through your letter of inquiry and correspondence with our staff, you state that you recently were elected to the District School Board of Martin County. You relate that you are the sole owner of an S-corporation. You state this corporation is a private education company which provides private tutoring to students in several counties, including Martin County. In particular, you state your company hires public school teachers—some of whom teach within the Martin County School District—on an independent contractor basis to provide private tutoring.

You relate that none of the tutoring is offered on school campuses, but rather at your company's office. You write that students call the company's office to request tutoring and that the office assigns each student to a particular tutor. You state that the students pay a fee prior to the start of each tutoring session.

You write that the School District has no involvement in these private tutoring activities. You state District policy does not prohibit teachers from accepting secondary employment as private tutors, although it does restrict them from tutoring students within their own classes.[1] Furthermore, you relate that while the District offers in-house tutoring on the same subjects for which your company provides private tutoring, this in-house tutoring is restricted to those students who qualify for free tutoring. You state your company does not provide tutoring to students who qualify for free in-house tutoring at the District.

Given this context, you inquire whether a prohibited conflict of interest will exist under the Code of Ethics if your company continues to offer private tutoring to District students—using District teachers—while you serve on the School Board. The provision relevant to your inquiry is Section 112.313(7)(a), Florida Statutes,[2] which provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold

> any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interest and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of the statute prohibits a public officer (e.g., a school board member) from being employed by, or having a contractual relationship with, a business entity which is being regulated by, or which is doing business with, her public agency. In your situation, the entire District would be your agency. See CEO 14-21. This first part of the statute is not applicable to your situation, as the tutoring arrangement that you describe does not place your company in a contractual relationship with the District or indicate that your company otherwise is doing business with the District. You indicate the District is not involved in, and does not regulate, your company's tutoring arrangement; your company simply hires teachers to perform tutoring services on an independent contractor basis.

The second part of the statute prohibits a public officer from having any employment or contractual relationship that will create a continuing or frequently recurring conflict between her private interests and the performance of her public duties or will impede the full and faithful discharge of her public duties. In CEO 14-21, we addressed a situation somewhat analogous to your own. The opinion concerned a school board member who was employed by a private corporation—a literacy foundation—seeking to recruit teachers from within the board member's school district to serve as reading mentors. In that situation, we found there would be a prohibited conflict of interest under the second part of Section 112.313(7)(a) because, if the board member engaged in teacher recruitment within the district, she "could be tempted to act less than objectively toward teachers in her [d]istrict depending on whether or not they worked for the [f]oundation." We reasoned this possibility could create a conflict between the board member's public position and her private interests, and, therefore, we concluded the board member should only recruit teachers from outside of her district.

Considering our reasoning in CEO 14-21, the question here is whether there is a reality that your private company's tutoring activities could hinder or compromise your public capacity duties as a member of the School Board. This question hinges upon whether your company's interaction with teachers within the District could affect your role as a School Board member. From what you indicate, we find that your role as a School Board member is susceptible to compromise.

While, unlike the school board member in CEO 14-21, it does not appear that your company would recruit new personnel from teachers within your District, you indicate your company recruited its current tutors from within your District. And although this recruitment occurred prior to your election to the Board, those recruited prior, as well as any new workers of your company from among District teachers contracting on their own initiative with your company, will, nevertheless, be teachers of your School District. Notwithstanding that you represent that your role as a School Board member does not require you to review how District teachers are performing, it is inescapable that the School Board, of which you are a member, has authority or responsibility regarding District teachers. For example, were you asked as a Board member to evaluate the effectiveness of District teachers, it is apparent that you could be favorably disposed towards those who perform private tutoring for your company. See 09-3, finding a conflict of interest when a public officer's private interests could affect his public duty to objectively evaluate, recommend, and supervise employees in his public capacity. This is so even though other District officials, such as the Superintendent, might have a more likely or more significant role regarding District teachers. An example of this is your role as a School Board member in disciplinary proceedings against teachers, which could be compromised by the private tutoring arrangement. You indicate that the School Board is required to review disciplinary recommendations made by the District Superintendent and staff against particular teachers. Were you to be asked as a Board member to evaluate a recommendation against a teacher also involved in your company's tutoring program, questions could be raised regarding your objectivity, even though you state that such disciplinary proceedings requiring Board review are "fairly rare" and that you would refrain from voting if a proceeding addresses a teacher involved with your company.[3]

In sum, under the situation you present, we find that a prohibited conflict of interest under Section 112.313(7)(a) would exist if your company continues to offer private tutoring to students within your District or to engage District teachers to provide tutoring.[4]

Question 1 is answered accordingly.

QUESTION 2:

Will a prohibited conflict of interest be created under Section 112.313(7)(a), Florida Statutes, if a company owned by a school board member provides STEM training to students within her district, either through a contract with the PTA or through financial arrangements with individual students?

Question 2 is answered in the affirmative.

You next ask whether you will have any conflicts of interest if your company provides science, technology, engineering, and math (STEM) training to students within your District. You state that your company has a full-time employee who offers such training, and that your company occasionally hires certified teachers to provide it as well. You relate that there are two ways in which your company offers STEM training.

You state the first way is through the District's parent-teacher association (PTA). You relate the PTA occasionally requests your company to provide robotics and other STEM programs in District classrooms, and then pays your company for any training provided. You state the PTA has a long-standing arrangement with the District allowing it to bring entities onto school grounds to offer such specialized training. You emphasize that there is no competition for space at District facilities, and that other non-profit groups can obtain access to District grounds if they meet certain criteria.

You state the second way that your company provides STEM training occurs when students pay for the training themselves. You indicate students from both within and outside the District register for STEM training on your company's website. You state your company then provides the training at its office.

The first part of the statute applies if you are employed by or in contract with an entity doing business with the District. If you were in contractual privity with the PTA, you would trigger this part of the statute as you would be in contract with an entity (the PTA) doing business with (via its facility-use arrangement) your agency (the District). However, you state that the PTA pays your company—not you personally—for any STEM training provided. We have found in the past that a public officer does not hold employment or a contractual relationship with an entity doing business with her agency when she is employed by or in contract with another business entity (including an entity for which she is the sole owner) which is, in turn, doing business with the entity contracting with her public agency. See CEO 13-19, CEO 07-2, CEO 97-17, CEO 94-37, CEO 88-43, and CEO 81-47, among many others. Accordingly, here, although your company is in a contractual relationship with an entity doing business with the School District, you are not.[5] And there is no indication in the situation presented that the PTA is seeking your personal services and merely paying you through your company, such that we could disregard your company as a legal entity separate from you personally. See CEO 14-2 (Question 2). Therefore, the first portion of Section 112.313(7)(a) does not apply.[6]

However, the second part of Section 112.313(7)(a) prohibits you from having any employment or contractual relationship that would create a continuing or frequently recurring conflict with your public duties or which would impede the full and faithful discharge of your public duties. We find this portion of the statute will be violated due to your company providing the STEM training, if it involves District teachers or District students. A District teacher/District student dynamic similar to that present in Question 1, above, will be present; and such could undermine your objectivity as a Board member regarding teacher or student matters.

Question 2 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 12, 2014, and **RENDERED** this 17th day of December, 2014.

Linda McKee Robison, Chair

[1]You indicate your company honors this policy, restricting teachers from privately tutoring students who are enrolled in their School District classes.

[2]Section 112.313(3), Florida Statutes, is not applicable to your inquiry since there is no indication that your company is renting, leasing, or selling any realty, goods, or services to the District.

[3]We also find that a similar conflicting dynamic is present regarding District students, in that they, too, could have matters ultimately coming before the Board and regarding which your objective performance as a Board member could be called into question depending on whether or not a given student was or was not a customer of your company. See CEO 13-21, and our decisions cited therein, finding a similar conflict if school district teachers, coaches, or others were involved with tutoring of students in their public school classes or charge.

[4]We by no means find that you actually would misuse your public position regarding teachers or students associated with you private business. However, Section 112.313(7)(a), unlike Section 112.313(6), Florida Statutes, requires only a "temptation to dishonor." Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982); and see Section 112.312(8), Florida Statutes, defining, with emphasis supplied, "conflict" or "conflict of interest" to mean: "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest."

[5]Supporting this reasoning is the concept that S-corporations—such as your company—are treated as separate legal entities from their owners, except in regard to assessing income tax. See Section 605.1103(3), Florida Statutes (2014). Additional statutes shield corporate shareholders and directors from being held personally liable for actions committed by their corporations. See Sections 607.0732(6) and 607.083(1), Florida Statutes.

[6]Also, this analysis would change were you performing the STEM training for your company via professional licensure. If an individual performs services for her employer pursuant to a professional license, she is deemed to hold a contractual relationship with any client who receives such services. See CEO 08-7. However, you indicate that you do not perform any STEM training for your company. Rather such training is performed by company employees other than you, or by outside contractors.

CEO 15-02—April 22, 2015

CONFLICT OF INTEREST

TEACHER SELLING SHIRTS AND OTHER ITEMS

To: Name withheld at person's request (Riviera Beach)

SUMMARY:

Sections 112.313(3) and 112.313(7)(a), Florida Statutes, would limit a public school teacher in marketing products offered for sale by a company she co-owns. CEO 92-6, CEO 98-25, CEO 04-17, CEO 10-15, CEO 12-23, and CEO 13-21 are referenced.[1]

QUESTION:

Would a prohibited conflict of interest be created if a public school teacher were to sell, through a company she co-owns, shirts and other items inside and outside the school and the school district where she is employed?

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

In your letter of inquiry and a subsequent email, you state that you are employed as a teacher at a high school in the Palm Beach County School District. You state that you and your fiancé (also employed as a teacher at the high school) co-own a company that markets monogrammed and embroidered shirts and other items and that your company proposes to offer these products for sale to the District, to the high school, and to individual employees of the high school, as well as to students enrolled in the high school and their parents.

Your scenario implicates Sections 112.313(3), and 112.313(7)(a) Florida Statutes. Section 112.313(3) states:

> 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 provision prohibits, among other things, a public employee or her business from providing goods, services, or realty to her public agency or to any part of her political subdivision. Absent the applicability of an exemption, this provision would prohibit you or your company from selling to the high school and to the District or any other school within the District.[2]

However, an exemption in Section 112.313(12)(f), Florida Statutes, regarding transactions of less than $500 in the aggregate per calendar year, could apply to negate the Section 112.313(3) prohibition if you were to be compensated less than $500 (in total) for such merchandise during a calendar year. See CEO 98-25. Also, the exemption in Section 112.313(12)(b) could be available if you were to do business (even in excess of $500) under a system of sealed competitive bidding with the business going to the lowest or best bidder, if you were to meet certain other requirements in that exemption. See CE Form 3A, available at www.ethics.state.fl.us. Note

that this process must be sealed competitive bidding rather than an RFP (Request for Proposals), RFQ (Request for Qualifications), or other method of procurement which may at times be referred to as "bidding."

The proposed sales of your company's products to students in your classes (or to their parents) implicates Section 112.313(7)(a), Florida Statutes, which provides:

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

The first part of Section 112.313(7)(a) would prohibit you from having any employment or contractual relationship with a business entity (e.g., your company) doing business with (selling to) your agency (the high school). CEO 92-6. The second part of Section 112.313(7)(a) would prohibit you from selling to students whom you teach or for whom you have responsibilities, or their parents, because, as the Commission has stated in similar contexts, marketing to students in your classes (or their parents) could undermine your objectivity in your public capacity toward those students. CEO 12-23 and CEO 13-21. You also are prohibited from selling to any school employees whom you may supervise or evaluate. CEO 92-6. The exemptions in Section 112.313(12), Florida Statutes, as explained above, can apply as to your sales to the District, to the high school, or to other parts of the District, to negate conflict under Section 112.313(7)(a).

Thus, the marketing activities you propose to undertake within the District would be allowed if you or your company do not sell to the high school where you are employed, to the District, or to other schools within the District. You or your company could sell merchandise to other school districts or to schools in other districts. Also, you or your company could sell to customers who pay with their personal funds, without limitation, unless they are students in your classes or in your public charge (or their parents) or if they are persons you supervise or evaluate in your public employment.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 17, 2015, and **RENDERED** this 22nd day of April, 2015.

Linda McKee Robison, *Chair*

[1]Opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]We find that your "agency" is the high school and that the District is your political subdivision. CEO 04-17, CEO 10-15, Section 1.01(8), Florida Statutes.

CEO 15-14—December 16, 2015

CONFLICT OF INTEREST

COUNTY EMPLOYEE ALSO LANDLORD CONTRACTING WITH COUNTY PURSUANT TO H.U.D. PROGRAM

To: Ms. Erin Hartigan, Assistant County Attorney (Lake County)

SUMMARY:

Under the circumstances presented, a prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, if a county employee acting as a landlord enters into a contract with the county pursuant to the H.U.D. Section 8 Housing Assistance Payments Program while simultaneously serving on a county committee reviewing the eligibility of Section 8 participants. A conflict also would be created under Section 112.313(3), Florida Statutes, if the employee enters into the contract because the employee would be accepting payment for providing realty or a service to the employee's political subdivision. Referenced are CEO 09-1, CEO 04-6, CEO 98-1, CEO 97-15, CEO 95-27, CEO 93-31, CEO 91-56, CEO 82-75, and CEO 77-88.

QUESTION:

Would a prohibited conflict of interest be created under Section 112.313(3) or Section 112.313(7)(a), Florida Statutes, were a county employee, acting as a private landlord, to enter into a contract with the county to provide housing to Section 8 tenants in exchange for receiving monthly housing assistance payments from the county?

Your question is answered in the affirmative.

By letter of inquiry and additional written information supplied to our staff, you state that a County employee serves in the County's Community Services Department. You relate that the Community Services Department has four Divisions (Administration, Housing and Community Development, Transit, and Health and Human Services), and that the employee works in the Administration Division as a Senior Financial Coordinator. You state that in that capacity the employee provides accounting and clerical services to the other Divisions within the Department, including preparing and maintaining the Department's annual budget.

You relate that the employee also has responsibilities concerning the County's participation in the Section 8 rental voucher program. While you state the employee has no influence over which tenants will be awarded vouchers under the program, the employee does compile a monthly report containing information on the number of vouchers that the County has issued and the total expenditures that the County has made under the program. In addition, you indicate the employee serves on a committee which conducts hearings on whether a Section 8 tenant's involvement in the program should be terminated for reasons such as violating the program's rules.

Furthermore, you state the employee, in a private capacity, has set up a limited liability company, for which the employee is the sole officer. You relate that through the company, the employee purchases and leases real property in the County. Given the employee's involvement with the County's administration of the Section 8 program, you inquire on the employee's behalf whether it will be a violation of any provision of the Code of Ethics for the employee's company to rent property to Section 8 tenants within the County, thereby participating as a landlord in the County's Section 8 program. To answer this question, it is necessary to first understand the purpose and implementation of the Section 8 program.

According to the information that you provided, including material taken from the website of the U.S. Department of Housing and Urban Development (HUD), the Section 8 program allows low-income families, the elderly, and the disabled to receive a federal subsidy to assist them in obtaining safe and sanitary housing. An individual receives funding by first applying to a local Public Housing Authority (PHA) for Section 8 assistance.

If the applicant meets eligibility criteria, the PHA will enter into a contractual agreement with the applicant's landlord—called a Housing Assistance Payments contract (HAP contract)—whereby the PHA agrees to make monthly housing assistance payments on the applicant's behalf in exchange for the landlord's guarantee to provide suitable housing. [1] The PHA then uses Section 8 funds received from HUD to pay a portion of the applicant's rent.

You state that the County has voluntarily chosen to serve as a PHA under the Section 8 program. Accordingly, you relate that HUD disburses a certain amount of Section 8 funds to the County and permits the County—acting as a PHA—to issue a certain number of vouchers. You state the County reports its use of Section 8 funds to HUD on a monthly basis and, if it is using less funds than HUD budgeted for a particular month, it returns any unused funds to HUD. [2]

You relate that Lake County has entrusted the Housing and Community Development Division of the Community Service Department with implementing the Section 8 program. You state the Division's Manager signs HAP contracts with various landlords on behalf of Lake County. You emphasize that although the employee also works for the Community Service Department, the employee is employed by the Administration Division, not the Housing and Community Development Division. As previously described, the employee's responsibilities regarding the Section 8 program extend only to preparing a monthly report containing data on the number/amount of vouchers issued by the County and serving on a committee which conducts hearings concerning the eligibility of program participants. Given this context, it appears the provisions relevant to your inquiry are Sections 112.313(7)(a), Florida Statutes, and Section 112.313(3), Florida Statutes.

Turning first to Section 112.313(7)(a), this statute provides:

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

The first part of the statute prohibits a public employee from being employed by, or having a contractual relationship with, a business entity (e.g., an LLC) being regulated by, or conducting business with, the employee's agency. Therefore, as a threshold matter, we must determine the County employee's "agency."

The term "agency," as defined in Section 112.312(2), Florida Statutes, means:

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state herein; or any public school, community college, or state university; or any special district as defined in s. 189.012.

We have found that the Legislature intended this term to encompass the lowest departmental unit within which an employee's influence might reasonably be considered to extend. See CEO 98-1, CEO 91-56, and CEO 82-75, Question 1. Accordingly, we have determined that when a particular local department has different divisions, it is the divisions themselves—rather than the entire department—which should be considered the employee's agency. For example, in CEO 95-27, we found the "agency" of employees assigned to the fire rescue operations division of a county public safety department to be the fire rescue operations division. See also CEO 93-31. Applying that reasoning here, we find the County employee's "agency" to be the Administration Division of the County's Community Services Department.

Given this, we do not find that a prohibited conflict will be created under the first part of Section 112.313(7)(a) if the employee's company rents property to Section 8 tenants, thereby participating in the County's Section 8 program. We are aware that such an arrangement would require the employee's company to enter into a HAP contract with Lake County. However, as described above, the contract would be signed on

behalf of Lake County by the Director of the Housing and Community Development Division of the Community Services Department. Because the employee's agency is the Administration Division—not the Housing and Community Development Division—such an arrangement would not place the employee's company in business with or under the regulation of the employee's agency. [3]

The second part of Section 112.313(7)(a), prohibits the employee from having any employment or contractual relationship that will create a continuing or frequently recurring conflict between the employee's private interests and the performance of the employee's public duties or that would impede the full and faithful discharge of the employee's public duties. A conflict of interest is defined in Section 112.312(8) as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." From what you indicate, the employee has two public duties which concern the Section 8 program.

First, the employee prepares monthly reports containing the number of vouchers issued by the County and the total disbursements that the County has made. [4] Because this report appears to simply relay data—and requires no discretionary act on the part of the employee which could benefit the employee or a potential Section 8 tenant—we find the fact that the employee may be renting to Section 8 tenants will not compromise or affect the employee's ability to perform this responsibility.

Second, the employee serves, as a County employee, on the committee which determines whether a tenant's participation in the program should be terminated, such as for violating program rules. Were the employee to begin renting to Section 8 tenants, the employee's ability to adequately perform this responsibility could be affected, as the employee could be asked to determine the eligibility of the employee's current or prospective Section 8 tenants. For this reason, it appears that if the employee rents to Section 8 tenants while serving on the committee, the employee will be in violation of the second part of Section 112.313(7)(a). [5]

Turning next to Section 112.313(3), this provision states in part:

> 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. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. 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.

Section 112.313(3) is implicated when a public employee acting in a private capacity rents, leases, or sells realty, goods, or services to the employee's political subdivision or to any "agency" of that political subdivision. [6] An individual is considered to be "acting in a private capacity" when a business for which he or she serves as an officer, director, proprietor, or holds a material interest (5% or greater) rents, leases, or sells to his or her political subdivision. See CEO 09-1. Here, the employee is the sole officer for the employee's LLC, and apparently owns substantial equity in it. Therefore, the question becomes whether a HAP contract between the employee's company and the County will mean the employee is renting, leasing, or selling a realty, goods, or services to the County, as prohibited by the statute.

We find that the employee will be acting in a private capacity to provide services and realty to the County inasmuch as the employee's company will be assisting the County in fulfilling certain obligations as a PHA, in exchange for pay from the County. In particular, the company will be providing property to be used in the Section 8 program, as well as an assurance that it will maintain the property at a certain level of safety and quality. Consequently, if the employee's company enters into a HAP contract with the County, a prohibited conflict will be created under Section 112.313(3), as the employee will be providing realty (housing) and services to the County in the employee's private capacity in exchange for remuneration. [7]

In short, as detailed above, we find that a prohibited conflict would be created under Sections 112.313(7)(a), and 112.313(3) if the employee's company enters into a HAP agreement with the County. We note that this opinion does not prohibit the employee's company from purchasing or renting property within Lake County that is not currently occupied by a Section 8 tenant. Nor does it prohibit the employee's company from purchasing property within the County that is currently occupied by a Section 8 tenant, so long as no contract is signed with the County and no Section 8 payments are received. [8]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 11, 2015, and **RENDERED** this 16th day of December, 2015.

Stanley M. Weston, *Chair*

[1]You relate the landlord also agrees not to raise the rent during the initial lease term, to incorporate certain terms required by HUD into the lease contract, and to maintain the housing unit in accordance with certain housing quality standards, including making repairs within the period specified by the PHA. You state the PHA can take legal action against the landlord if these conditions are violated.

[2]You state that HUD retains these unused funds as a "buffer" for months when the County may exceed it authorized budget authority.

[3]This situation is distinguishable from CEO 77-88 in which a Lee County Commissioner sought to rent property to participants in the Section 8 Program. In that scenario, we determined that the HAP contract would be between the Commissioner—acting in his private capacity as a landlord—and the County's Housing Assistance Office, which was directly regulated by the County Commission. Because the Housing Assistance Office was considered a part of the Commissioner's agency, we found the circumstances were sufficient to constitute a violation of the first part of Section 112.313(7)(a). Here, however, that prohibition is not triggered as the HAP contract will not place the employee's company in business with or under the regulation of the employee's agency.

[4]We note that you have included a copy of a monthly report in the submitted materials.

[5]While Section 112.316, Florida Statutes, has been used to "grandfather" in contractual relationships with business entities doing business with a public employee's agency, it is not necessarily applicable to negate a conflict under the second, as opposed to the first, part of Section 112.313(7)(a). See CEO 97-15.

[6]The term "political subdivision" is more expansive than the term "agency" and can include the entire county where a public employee serves. See Section 1.01(8), Florida Statutes.

[7]While Section 112.313(3) expressly grandfathers in certain contracts, it does not appear the employee qualifies for this statutory exemption because any HAP contract between the employee's company and the County will be executed after the employee began public employment.

[8]The employee's scenario is distinguishable from cases where there is a "no strings attached" relationship between the public employee's company and the public employee's agency. For example, in CEO 04–6, we advised a city councilmember that he could accept private employment from an economic development council receiving city funds without having a prohibited conflict of interest. Essential to that opinion was the fact that the economic development council was free to use the city funds as desired by its board of directors and, therefore, it had no obligation towards the city. Here, by contrast, the employee's company would incur certain obligations towards the

County by entering into the HAP contract and the County could take legal action, including recovery of overpayments, if the employee's company failed to meet them.

CEO 16-09 — June 8, 2016

CONFLICT OF INTEREST; MISUSE OF POSITION; VOTING CONFLICTS

COUNTY HUMAN SERVICES ADVISORY BOARD MEMBER REPRESENTING A CLIENT IN LITIGATION AGAINST ENTITIES FUNDED BY THE COUNTY

To: Name withheld at person's request (Key West)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a member of a County Human Services Advisory Board to represent a plaintiff in a lawsuit against two nonprofit entities whose funding request must come before the Board. This conflict of interest could be negated by a waiver under Section 112.313(12), Florida Statutes. The member is advised to keep separate his private interests from his public responsibilities, thereby avoiding allegations of misuse of position or disclosure or use of certain information. Further, the member must abstain from voting and comply with the other requirements of Sections 112.3143(3) and 112.3143(4), Florida Statutes, regarding Board measures that will affect the two nonprofit organizations that are defendants to the lawsuit in which the member is serving as counsel. Referenced are CEOs 16-2, 14-3, 12-1, 09-8, 06-24, 05-10, 03-7, 99-2, 98-11, 96-1, 94-5, 92-11, 90-10, 88-8, 86-37, 81-66.[1]

QUESTION 1:

Would a prohibited conflict of interest be created were a member of a County Human Services Advisory Board to represent a client in litigation against two nonprofit organizations funded by the County pursuant to recommendations made by the Board?

This question is answered in the affirmative.

In your letter of inquiry and subsequent conversations with our staff you advise that you are requesting an opinion on behalf of a member of the County's Human Services Advisory Board (HSAB). You state that the HSAB was created by the Board of County Commissioners (BOCC) in 1991 to make funding recommendations for community-based nonprofit entities which provide health and social services for the citizens of the County. The HSAB is an advisory board consisting of five members, with each County Commissioner designating one HSAB member. Each year the BOCC sets the total amount that it will fund for the upcoming fiscal year for all entities that have filed applications for funding. The HSAB reviews funding requests for the qualifying nonprofit entities, and recommends specific funding allocations for each entity it deems worthy of funding. The BOCC makes the final decision for funding for each entity.

You further state that a current member of the HSAB is an attorney in private practice representing the plaintiff in a pending lawsuit filed against multiple defendants, including two nonprofit entities. You state that in prior years both of these entities were funded by the County through the HSAB process and both have submitted applications to the HSAB for funding in the upcoming fiscal year. You further relate that while HSAB funding must be used to fund substantive programs of the respective nonprofit entity, the appropriation or non-appropriation of HSAB funding could affect the organization's overall budget, and thereby impact the entity's ability to devote resources to defense costs or satisfy any adverse judgments. Finally, you state that, because he serves on the HSAB, the member will be in a position to question representatives of the defendant nonprofit entities on matters that could benefit his private client's case and thus indirectly benefit him.

Pertinent to your inquiry is Section 112.313(7)(a), Florida Statutes, which provides:

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

The first part of this statute prohibits a public officer from being employed by or having a contractual relationship with a business entity which is subject to the regulation of his agency or is doing business with his agency. We have long held that the "agency" of a member of an advisory board includes both the board as well as the governing body. See CEO 16-2, CEO 06-24, and CEO 05-10. As the HSAB advises the BOCC, the "agency" of HSAB board members includes the BOCC.

As an attorney and senior partner of his firm, the HSAB member has a contractual relationship with his client and every other client of his firm. See, among others, CEO 03-7, CEO 96-1 (Question 2), CEO 94-5, CEO 92-11, CEO 86-37, and CEO 81-66. However, nothing in your materials suggests that the member's client is doing business with, or regulated by, the County. Therefore, this part of the statute does not apply.

The second part of the statute concerns whether the member's contractual relationship with his client—given the pending lawsuit against two entities seeking funding via the HSAB process—would create a continuing or frequently recurring conflict between his private interests and the performance of his duties as an HSAB member or would impede the full and faithful discharge of these duties. The District Court of Appeal in Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982) stated that this prohibition:

> establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation which 'tempts dishonor.'

Section 112.312(8), Florida Statutes, defines "conflict" or "conflict of interest" as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Applying Zerweck, in conjunction with the definition of "conflict" cited above, we must examine the nature of the HSAB member's public duties along with the obligations of his private relationship as an attorney with his client, to determine if the two are compatible.

The HSAB was created with the express purpose of analyzing, deliberating, and making recommendations to the BOCC regarding the funding applications of nonprofit entities which provide health and social services to citizens in the County. The two defendant nonprofit entities receive their funding based upon the recommendations of the HSAB, and currently have funding applications pending for consideration by the HSAB. Thus, in this matter the member's HSAB duties would involve determining whether the defendant nonprofit entities deserve funding—and if so, in what amount—in a fair and impartial manner.

As an attorney, the member has both an interest in a successful outcome to the litigation for his client and an obligation to act in his client's best interests. His client is suing two of the entities seeking funding through his board and his board's decisions with respect to the appropriation or non-appropriation of funding ultimately will affect the defendant nonprofit entities' overall budget; potentially impacting their ability to devote resources to litigation defense costs or satisfy an adverse judgment. The member will also have an opportunity to question the defendant entities' representatives—and the answers to those questions may be useful to his private client in the litigation.

These circumstances create an impermissible conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes. The representation of a plaintiff in litigation against the respective nonprofit entities would impede the HSAB member's duty to impartially evaluate the funding applications of the defendant entities and to make objective determinations regarding whether funding the respective nonprofit entity is in the best interests of the County.[2] This conflict of interest would not be ameliorated were another attorney in the member's firm to take over representation of the plaintiff in the litigation, as an attorney has a contractual

relationship with every partner and each client of his or her law firm, and because the firm, with which the member is inextricably intertwined, would remain on the case.[3] See, for example, CEO 03-7 and CEO 88-8.

Section 112.313(12), Florida Statutes, provides for a waiver of conflicts of interest under Section 112.313(7)(a), Florida Statutes. Section 112.313(12), Florida Statutes, provides in pertinent part:

> The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person.

The conflict of interest involved herein may be ameliorated were the BOCC to vote to waive the particular conflict of interest upon full disclosure by the HSAB member of the conflicting relationship on CE Form 4A prior to the waiver and an affirmative two-thirds vote of the BOCC, as the appointing body, waiving the conflict. See CEO 99-2. Absent such a waiver, a prohibited conflict would exist under the second part of Section 112.313(7)(a), under the circumstances you present.

QUESTION 2:

> Would Section 112.313(6), Florida Statutes, be violated were the member to engage in the several actions discussed below?

Your question is answered as set forth below.

Assuming that the HSAB member were to successfully obtain a waiver of the above-referenced conflict of interest pursuant to Section 112.313(12), the member may continue to serve on the HSAB and participate in the deliberations regarding the funding applications of the applicant nonprofit organizations. However, such a scenario raises additional issues—which you raise in your inquiry—concerning the extent to which the member may ask questions of the defendant entities' representatives during the HSAB's deliberations and discussions of the entities' funding applications, the answer to which may glean information which could benefit his private client.

As a caveat, we direct your attention to the following provisions of the Code of Ethics:

> MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly 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. [Section 112.313(6), Florida Statutes]

> DISCLOSURE OR USE OF CERTAIN INFORMATION.—No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his 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 member from using his official position to gain access to information which would not be available to the general public, and from otherwise using his official position in a manner inconsistent with the proper performance of his public duties for the benefit of any of his private clients. We do not know in advance what specific actions the member might take, and cannot prospectively rule on whether

they may violate these provisions, particularly since Section 112.313(6) has a corrupt intent element and is not susceptible to analysis in the context of an advisory opinion. However, as we did in CEO 09-08 and CEO 90-10, we advise that in order to avoid even the appearance of impropriety, the member should scrupulously separate his public role from his private pursuits in his interactions with entities that are subject to the determinations or input of the HSAB.

QUESTION 3:

Would the member be presented with a voting conflict under Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, concerning measures regarding the funding applications of nonprofit entities in the County?

Guidance is provided below.

Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, provide:

> 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]

In addition, Section 112.3143(4)(c), Florida Statutes, defines the term "participate" to mean "any attempt to influence the decision by oral or written communication, whether made by the officer or at the officerâ€™s direction."

The voting conflicts statutes require that if a measure before a member's board would inure to his special private gain or loss, to that of his firm, or to that of a principal by whom he is retained, the officer would be required to comply with Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, by abstaining from voting and following the instructions for appointed officers on CE Form 8B. See e.g., CEO 03-07, CEO 94-05, and CEO 98-11.

Each year the BOCC sets the total amount of funding for the upcoming fiscal year for all of the entities applying for assistance. The HSAB then meets to review the funding requests from the qualifying nonprofit entities and ask questions of the applicant representatives regarding the particularities of their respective funding request. Pursuant to these deliberations specific funding levels are ascribed to each entity which affect the availability of funding for the remaining applicants. Once a funding consensus regarding the applicant funding

levels of each entity has been determined by the board, it votes to approve the recommended funding levels via a single vote.

Initially, we recognize that the HSAB's appropriation or non-appropriation of funding to the two defendant entities will affect their overall budget and may impact their ability to devote resources to their defense costs or to satisfy a judgment—to the advantage or disadvantage of the member's client. Therefore, measures before the HSAB concerning the funding applications of the two nonprofit entities that are defendants in the pending litigation will present a voting/participation conflict. In addition, however, our analysis of the HSAB's deliberative process used to derive the ultimate funding levels for each applicant indicates that its determination with respect to the level of funding for one applicant affects the availability of funding for all remaining applicants, including the two defendant entities. Due to the interrelatedness and interconnected nature of the allocation of a limited fund amongst many applicants, we cannot say that the two defendant applicants are only affected by the deliberation and determination on their specific applications. For this reason, we find that so long as the member maintains a contractual relationship with his client, the plaintiff to pending litigation against two of the nonprofit entity applicants, or he or his firm has a fee interest in the outcome of the case, he should abstain from voting on all measures involving the funding applications of the nonprofit entities, including those of the two defendant entities, and comply with the additional requirements of Section 112.3143(3)(a) (i.e., declare the conflict and timely file a CE Form 8B memorandum of voting conflict).[4]

With respect to the member's ability to participate in the discussion of such measures, Section 112.3143(4), Florida Statutes, prohibits such participation, unless the member first complies with the disclosures and actions required therein (see the instructions on Form 8B for appointed officers).

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 2016, and **RENDERED** this 8th day of June, 2016.

Stanley M. Weston, *Chair*

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

[2]In making our finding of a prohibited conflict, we do not impugn the character or personal integrity of the member. As the Zerweck court noted, the statute is purely preventative in nature, and requires no intentional or wrongful transgression on the part of the member such as would be required for a corrupt use of position under Section 112.313(6), Florida Statutes. We find no such transgression here; our opinion addresses only the incompatibility of serving on a board affecting the two entities' funding and simultaneously representing clients in a lawsuit against the entities.

[3]Similarly, we find that the referral of the case to another firm, with the member or his firm retaining a fee-sharing stake in the outcome, would not cure the conflict.

[4]Compliance with the voting conflicts laws (Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes) does not negate a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes. See CEO 03-7 and CEO 94-5.

CEO 16-12—October 26, 2016

CONFLICT OF INTEREST

TEACHER EMPLOYED AS ATTORNEY

To: Thais Alvarez (Miami-Dade Public Schools)

SUMMARY:

Section 112.313(7)(a), Florida Statutes, would prohibit a public school teacher from employment —as general counsel to a non-profit organization or as a sole practitioner—that would include representation in lawsuits against the school board/district in the district where she is employed. CEO 82-7, CEO 88-8, CEO 10-15, and CEO 13-21 are referenced.[1]

QUESTION:

Would a prohibited conflict of interest be created if a public school teacher were to be employed as general counsel or as a sole practitioner to represent a non-profit organization or individuals filing lawsuits against a teachers' union and the school board/district in the district where she is employed as a teacher?

Your question is answered, in part, in the affirmative.

In your inquiry and further information provided to our staff, you state that you are employed as a teacher by the District School Board of Miami-Dade County and, in that position, you teach English to speakers of other languages (ESOL) to middle school students. You further state that you are an attorney licensed in Florida and that you would like to accept private-capacity employment as general counsel for a non-profit organization (Educators Educating Educators, Inc.). You explain that this organization provides information to teachers and parents related to "the politics behind the policies" of public education. You state that, as general counsel, you would provide legal advice and representation to directors and officers of the organization in litigation concerning matters related to Florida education policies and you would expect to represent individuals, including yourself and other teachers, in lawsuits alleging unfair labor practices against a teachers' union and the District School Board. You state that the organization is not regulated by or doing business with your school or the School Board/District. Alternatively, you would like to provide legal services as a sole practitioner representing individuals, including yourself, and that such services could involve lawsuits against a teachers' union and the District School Board. You ask what, if any, Code of Ethics restrictions would apply if you were to be employed or to enter into contracts as stated above.

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

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

The first part of this provision would prohibit you from having any employment or contractual relationship with a business entity or agency that is regulated by or is doing business with your agency. In CEO 10-15, we found that a teacher's agency is the school at which he or she is employed and that even a self-

employed person can be a business entity.[2] Therefore, your public agency, for purposes of this provision of the Code of Ethics, would be the school where you teach and your private-capacity business entity employers would be the organization employing you as general counsel and your personal law office. We find that you would have a prohibited conflict of interest under the first part of Section 112.313(7)(a) if the school where you teach were to regulate or to do business with the organization or with your personal law office. Since you state that neither your school nor the School Board/District regulates or does business with the organization or your personal law office, we find your proposed legal employment would not create a prohibited conflict under the first part of Section 112.313(7)(a), Florida Statutes.

The second part of Section 112.313(7)(a) prohibits any employment or contractual relationship that would give rise to an actual conflict of interest and establishes an objective standard which requires an examination of the nature and extent of the public employee's duties together with a review of her private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation that tempts dishonor. Zerweck v. State, Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982). Thus, the relevant issue would be whether your employment or contractual relationship as an attorney in the scenario you describe would create a continuing or frequently recurring conflict or would impede the full and faithful discharge of your duties as a public school teacher. We find that your employment as general counsel to the organization, if limited to providing representation of parties in litigation against a teachers' union or other private entity,[3] would not create a recurring conflict or impede discharge of your teaching duties. However, if you were to represent parties in lawsuits or otherwise become involved in litigation against the School Board/District, the resulting adversarial relationship with the School Board/District, which is your ultimate employer, would potentially affect your employment status and your ability to fully discharge your duties in your teaching position. CEO 82-7 and CEO 88-8. We find that, insofar as your legal employment would involve representation of parties in lawsuits against the School Board/District, such employment would create a prohibited conflict of interest under the second part of Section 112.313(7)(a).

Thus, we find that you would have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if you were to represent individual clients or to be employed as general counsel for a non-profit organization if you or the organization were to become involved in lawsuits against the School Board/District.

Your inquiry is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 21, 2016, and **RENDERED** this 26th day of October, 2016.

Matthew F. Carlucci, *Chair*

[1] Opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2] "Agency" is defined in Section 112.312(2), Florida Statutes, as "any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative."

[3] However, we find that a prohibited conflict would be created if any of the parties (your clients) were also students in your classes (or their parents or guardians) or District employees subordinate to you. See CEO 13-21 and opinions cited therein.

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 provides—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:

> . . .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.

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.

CEO 22-1—March 4, 2022

CONFLICT OF INTEREST; VOTING CONFLICT

MEMBER OF BOARD OF GOVERNORS OF STATE UNIVERSITY SYSTEM SERVING AS OFFICER IN CORPORATION WHOSE PARENT COMPANY OWNS SEPARATE SUBSIDIARY DOING BUSINESS WITH A STATE UNIVERSITY

To: Name withheld at person's request (Tallahassee)

SUMMARY:

Under the specific circumstances presented, a prohibited conflict of interest would not be created under Sections 112.313(3) or 112.313(7)(a), Florida Statutes, were the Board of Governors of the State University System to approve a project agreement involving a state university and a corporation, when a serving Board member owns stock in the corporation's parent company and serves as a paid officer of a separate subsidiary of the parent company. However, the Board member is required to comply with the voting and participation conflicts laws in Section 112.3143, Florida Statutes, in any matters concerning the project agreement. Referenced are CEO 20-10, CEO 20-3, CEO 18-12, CEO 17-12, CEO 12-15, CEO 11-13, CEO 11-5, CEO 09-2, CEO 09-1, CEO 05-8, CEO 03-13, CEO 99-13, CEO 94-5, CEO 93-11, CEO 86-36, and CEO 86-12.

QUESTION 1:

Would a prohibited conflict of interest be created if a member of the Board of Governors of the State University System serves as a paid officer of a corporation when that corporation's parent company owns a separate subsidiary conducting business with a state university?

Under the circumstances presented, Question 1 is answered in the negative.

In your letter of inquiry and additional information provided to our staff, you indicate you are inquiring on behalf of a member of the Board of Governors for the State University System (Board). The Board member was appointed to his position by the Governor,[1] and the Board itself oversees the State University System, of which the University of Florida (UF) is a member.[2] While the Board has general responsibilities concerning the institutions within the State University System, each university is directly administered by its own board of trustees.[3]

In addition to serving on the Board, the member in question is also employed as the Chief Executive Officer of Florida Power and Light Company (FPL). FPL, you relate, is a wholly-owned subsidiary of NextEra Energy, Inc. (NEE), a publicly-traded corporation with operations spanning the United States and Canada. You state that—as the parent company—NEE appointed the Board member to his position with FPL and plays an active role in FPL's operation, with the companies sharing several of the same executive officers. You also relate the Board member has a personal ownership interest in NEE, as he owns approximately 160,917 total shares of NEE stock.[4]

However, from what you indicate, NEE currently has 1,962,000,000 shares of publicly-traded stock, meaning the Board member's ownership interest equates to less than .0001%. You also relate the Board member's service as an officer is with FPL alone; and state that he is not an officer, partner, director, or proprietor of NEE. And since NEE currently has over one thousand subsidiaries,[5] you state the Board member's company—FPL—is operated separate and independent from the other subsidiaries that NEE owns.

This point is especially germane to your inquiry, which concerns a separate NEE subsidiary named DG Concession Holdings, LLC (DG Concession Holdings). DG Concession Holdings is owned by a series of companies, all of which are ultimately owned by NEE.[6] You emphasize the Board member has no ownership interest in—and is not an officer, partner, director, or proprietor of—DG Concession Holdings, and has no

ownership in, or status in relation to, any other corporate entity involved with DG Concession Holdings, apart from his ownership of NEE stock.

Your inquiry focuses upon the potential interface that DG Concession Holdings may have with UF. More specifically, you indicate DG Concession Holdings is part of a private consortium called Gator Campus Energy, which is an entity comprised of DG Concession Holdings and two other companies, with all the companies involved serving as equal partners.[7] Gator Campus Energy has responded to an Invitation to Negotiate (ITN) issued by UF, and recently learned it has been added to the short list of companies eligible to submit a more refined proposal. In the event that UF selects Gator Campus Energy as its preferred vendor, the University will present for the Board's approval a project agreement between UF and Gator Campus Energy. Given that DG Concession Holding is part of the Gator Campus Energy consortium—and that DG Concession Holding and FPL are both subsidiaries of NEE—you inquire whether the Board member will have a prohibited conflict of interest were the Board to approve a project agreement between UF and Gator Campus Energy.

You stress that the Board itself plays no role, and will provide no input, in the ITN process or in UF's selection of a private developer. You indicate UF is seeking, through the ITN, a private partner: (1) to assist in designing, financing, constructing, operating, and maintaining a central energy plant on campus which will produce steam, chilled water, and electricity; (2) to finance and construct new thermal distribution pipes to handle the chilled water that the energy plant will produce; and (3) to finance and construct a new electrical substation which will connect the new energy plant's electrical system to Duke Energy facilities. You state UF is, in all respects, following the Board's guidelines for soliciting private partners for capital projects, and that the ITN process is the Board's preferred method for competitively soliciting a private partner. However, you emphasize the Board's sole responsibility—after UF selects its preferred developer—will be to approve the project agreement. And you note the Board will not be a party to the agreement, which will be between UF's Board of Trustees[8] and the developer.

Nor will the Board be involved in implementing the project agreement once it is approved. You indicate the Board will not be overseeing the construction of the energy plant, the distribution pipes, or the electrical substation, and that UF will be overseeing the construction without the Board's involvement.[9] And, after the different facets of the project are completed, the Board will have a minimal role in their operation. You state that, under the arrangement UF is proposing, the selected developer will operate and maintain the energy plant, while UF will operate and maintain the distribution pipes and the electrical substation, all without any involvement from the Board.

You indicate as well that FPL will not be affected if Gator Campus Energy—the consortium involving DG Concession Holdings—is selected as the project developer. As previously explained, the only parties to the project agreement will be UF's Board of Trustees and Gator Campus Energy, not FPL or NEE. You emphasize FPL will have no responsibilities concerning the project, and will receive no payment or remuneration pursuant to the project agreement. In fact, because UF is outside of FPL's regulated service territory, you state FPL is precluded from being involved in the sale of retail electricity in that region.

Relevant to whether a project agreement involving DG Concession Holdings will present a prohibited conflict of interest for the Board member are the following provisions of the Code of Ethics for Public Officers and Employees:

> 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.
[Section 112.313(3), Florida Statutes]

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIOSHIP. —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, any 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. [Section 112.313(7)(a), Florida Statutes]

Section 112.313(3), Florida Statutes, prohibits the Board member from acting in his official capacity, as a public officer, to purchase any realty, goods or services for his agency from a business entity where he is an officer, partner, director, or proprietor, or holds a material interest.[10] A public officer is considered acting in his or her official capacity when a body or board of which he or she is a member acts to purchase realty, goods, or services. See CEO 99-13, Question 1. The statute also prohibits the Board member, acting in a private capacity, from selling any realty, goods, or services to his agency or political subdivision. This can occur if a corporation for which the Board member is an officer or director, or in which he owns a material interest, sells the realty, goods, or services to his agency or political subdivision. See CEO 09-1.

Turning to your inquiry, an argument could be made that the Board member's "agency" for purposes of Section 112.313(3) encompasses the Board as well as the institutions within the State University System. See CEO 17-12, Question 2. Accepting this interpretation, any entity doing business with UF's Board of Trustees would be doing business with the Board member's "agency." However, in the event that the Board approves a project agreement with Gator Campus Energy, neither the Board nor UF's Board of Trustees will be purchasing services from a business entity in which the Board member is serving as an officer, partner, director, or proprietor, or in which he has a material interest. From what you indicate, the project agreement will name only Gator Campus Energy as the developer, meaning only Gator Campus Energy and its equity members, such as DG Concession Holdings, will be selling services under the agreement. The Board member has no ownership or officer-ship in Gator Campus Energy or in any of its equity members. FPL—the corporation where the Board member does serve as an officer—will not be involved in the project, and while the Board member owns stock in NEE—the parent company of DG Concession Holdings—he is not an officer, partner, director, or proprietor of NEE, and his ownership interest equates to less than .0001 percent, which is not enough to be considered a "material interest" triggering the statute's application. For these reasons, we find the Board member will not have a prohibited conflict under Section 112.313(3) if the project agreement with Gator Campus Energy is approved.

Regarding Section 112.313(7)(a), Florida Statutes, the statute has two parts. The first part prohibits the Board member from having a contractual relationship with a business entity if that entity is doing business with, or is subject to the regulation of, the Board member's agency. In CEO 99-13, the Commission stated the application of this portion of the statute hinges upon:

> (1) identifying the 'business entity' with which the official has an employment or contractual relationship and (2) [] identifying the 'business entity' that is doing business with the governmental agency, in order to determine whether the official's employment or contractual relationship is with the same 'business entity' that is doing business with his or her agency.

When applying this statutory prohibition, the Commission has, in the past, turned to the definition of a "business entity" contained in Section 112.312(5), Florida Statutes, which defines the term as:

> Any corporation, partnership, limited partnership, company, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

This language specifies "[a]ny corporation . . . doing business in this state[,]" which recognizes the separateness of corporations one from another. See CEO 09-2, Question 1. For this reason, the Commission repeatedly has determined that corporate subsidiaries are separate business entities from each other for purposes of the statute. See, among many, CEO 18-12, CEO 99-13, Question 1, and CEO 05-8. Or, stated another way, even if a public officer has an employment or contractual relationship with a particular corporation, that does not mean he or she also an employment or contractual relationship with that corporation's sibling subsidiaries. See CEO 09-2, Question 1.

Here, in the event that the Board approves the project agreement with Gator Campus Energy, it will be doing business with the entities comprising that energy consortium, including DG Concession Holdings. However, the Board member has no employment or contractual relationship with DG Concession Holdings, only with FPL, which is a separate and distinct corporation. While DG Concession Holdings and FPL are sibling subsidiaries of the same parent company—NEE—this does not change the analysis. To find otherwise would mean the Board member would have an employment or contractual relationship with each of NEE's over one thousand subsidiaries simply because of his employment with one of them.

Nor will the Board member's stock in NEE—the parent company—trigger the first part of Section 112.313(7)(a) if Gator Campus Energy secures the project agreement. The Board member does have a contractual relationship with NEE by virtue of his stock ownership. See CEO 11-13. However, the Commission has long treated parent corporations as separate business entities from their subsidiaries for purposes of Section 112.313(7)(a). See CEO 11-5, Question 1, CEO 86-36, and CEO 86-12. This again reflects the language in the definition of "business entity" emphasizing the separateness of each corporation.[11] Consistent with these decisions, we find NEE is a separate "business entity" from its corporate subsidiaries for the purposes of Section 112.313(7)(a), and, therefore, the Board member's contractual relationship with NEE does not mean he has that same relationship with DG Concession Holdings. Accordingly, were the Board to approve a project agreement involving DG Concession Holdings, the Board member will not be in violation of the first part of Section 112.313(7)(a), even considering his stock ownership in NEE, because, mechanically speaking, he will not have an employment or contractual relationship with a business entity doing business with his agency.[12]

We also note the other requirement of this first part of Section 112.313(7)(a) is that the business entity with which the public officer has an employment or contractual relationship must be "doing business" with his or her agency. A business entity is "doing business with" an agency when they have have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a breach or default. See CEO 20-3, Question 1 and CEO 12-15. Traditionally, contractual relationships with a corporation result in liabilities only for that corporation, not for the shareholders or owners of that corporation. See CEO 99-13, Question 1. Stated another way, because corporations are formed to limit liability, the corporate entities themselves are the only parties legally liable in the event of a breach or default, not their shareholders or owners. Here, only Gator Campus Energy and its equity partners—including DG Concession Holdings—would be held liable for breaching the project agreement. Although NEE is DG Concession Holdings' corporate parent, neither NEE nor any of its other corporate subsidiaries would be liable. Therefore, the Board member would have no employment or contractual relationship with a business entity "doing business" with his agency if the project agreement were approved.

Regarding the second part of Section 112.313(7)(a), the statute prohibits the Board member from holding employment or a contractual relationship that would 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. See CEO 18-12. This part of the statute does not hinge on the public officer's employment or contractual relationship being tied to a business entity doing business with or being regulated by his or her agency. In this respect, it is broader than the first part, and can be triggered based on any employment or contractual relationship that creates a conflict of interest. For the purposes of the statute, the phrase "conflict of interest" is defined in Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." To determine whether such a conflict has

occurred, the Fourth District Court of Appeal held in Zerweck v. State, Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), that the Commission must examine:

> The nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct or whether they coincide to create a situation which 'tempts dishonor.'

One instance where we found the second part of the statute applicable was in CEO 18-12, which involved a county commissioner who was employed by a subsidiary of a waste management company. Part of his employment duties involved serving as a marketing sales representative for a sibling subsidiary, and this sibling subsidiary was planning to respond to a Request for Qualifications (RFQ) being issued by the county. In the event that the sibling subsidiary entered into a business relationship with the county, we found the county commissioner would not be in violation of the first part of Section 112.313(7)(a), as the sibling subsidiary was a separate and distinct business entity from the corporation where he was employed. However, we found the arrangement would trigger the second part of Section 112.313(7)(a), as the county commissioner, in his private capacity, would be assisting the sibling subsidiary in performing the county contract while, at the same time, reviewing and overseeing that performance in his public capacity. Because of the overlap between his private employment and his public duties, we determined the second part of Section 112.313(7)(a) would be triggered were the county to enter into business with the sibling subsidiary. However, we noted this conflict would not occur if the county commissioner were reassigned to another corporate subsidiary not conducting business with the county, as then he would not have any private employment responsibilities that could affect the performance of his public duties.

Here, unlike in CEO 18-12, we do not find the situation indicates a conflict of interest under the second part of Section 112.313(7)(a). Regarding the Board member's public duties, you relate the Board's only role in the ITN selection process is to vote to approve the developer selected by UF. Otherwise, the Board has no role in the ITN process, will not be asked to provide input to UF, and will not be a party to the project agreement with the developer. And after the developer is selected, you relate the Board will largely leave the construction, management, and operation of the various facets of the project to UF and the developer, and will only become involved if a material change is needed to the project agreement. Accordingly, the Board member will have minimal to no public responsibilities concerning the project, except being asked to approve the project developer.

And, under the facts as submitted, if Gator Campus Energy is selected as the project developer, the Board member will have no private responsibilities concerning the project, and the personal benefit to him, if any, will be minimal. You relate FPL, where the Board member serves as the Chief Executive Officer, will have no responsibilities under the project agreement, and will receive no payment or remuneration of any kind related to the project. Indeed, from what you indicate, FPL cannot even provide services in the area of the State where UF is located. Therefore, it seems unlikely that the Board member's employment with FPL would affect the performance of his public duties if Gator Campus Energy is selected as the proposed developer.

An argument could be made that the Board member's contractual relationship with NEE, via his stock ownership, could create a conflict of interest were the Board to be asked to approve an agreement involving its subsidiary, DG Concession Holdings. The argument would be that his stock ownership in NEE, and the fact that DG Concession Holdings is an NEE subsidiary, could affect his objectivity in deciding whether to approve the agreement. However, the Board member's stock ownership in NEE equates to a less than .0001% interest. And even if the consortium of which DG Concession Holdings is a member performs work on the project, it is difficult to predict how, and to what degree, this will affect the value of its parent company's stock. Clearly, there will be some economic effect on NEE, as it is the parent company, but the extent of that effect is uncertain. Considering this uncertainty, and coupling that with the Board member's comparatively small interest in NEE and the Board's limited involvement with the project, we find a prohibited conflict of interest does not exist for the Board member under the second part of Section 112.313(7)(a).

While we find that a prohibited conflict of interest will not be created for the Board member were his Board to approve the selection of Gator Campus Energy as the project developer, we caution the Board member that he needs to treat such a vote as a voting conflict under Section 112.3143, Florida Statutes, and respond in accordance with the requirements of that provision, as explained infra in Question 2. Moreover, our decision herein, which was reached based on the unique facts present in this matter, does not preclude our application of

the prohibitions contained in Section 112.313(6), Florida Statutes, or Article II, Section 8(g), Florida Constitution, if the Board member engages in conduct indicative of a misuse of public position or an abuse of public position to obtain a disproportionate benefit.

Question 1 is answered accordingly.

QUESTION 2:

> Would a voting conflict of interest occur were a member of the Board of Governors of the State University System to vote to approve the selection of a corporation as a project developer, when that corporation's parent company also owns the Board member's corporate employer?

Under the circumstances presented, Question 2 is answered in the affirmative.

You also inquire whether the Board member would have a voting conflict under Section 112.3143, Florida Statutes, the voting conflict law, in the event that the Board is asked to approve a project agreement involving DG Concession Holdings. The Board member is obligated to comply with the following provisions of Section 112.3143 due to his status as an appointed state officer:

> A state public officer may not vote on any matter that the officer knows would inure to his or her special private gain or loss. Any state public officer who abstains from voting in an official capacity upon any measure that the officer knows would inure to the officer's special private gain or loss, or who votes in an official capacity on a measure that he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained other than an agency as defined in s. 112.312(2); or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer, shall make every reasonable effort to 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. If it is not possible for the state public officer to file a memorandum before the vote, the memorandum must be filed with the person responsible for recording the minutes of the meeting no later than 15 days after the vote. [Section 112.3143(2)(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 this or her interest in the matter. [Section 112.3143(4), Florida Statutes]

(emphasis added).

These statutory provisions indicate the Board member will have a voting conflict if a measure will inure to the special private gain or loss[13] of a "parent organization [] of a corporate principal" by which he is retained. In the past, the Commission has found that a "parent organization" can be a parent company of a corporation where one is employed. See CEO 20-10, CEO 05-8, and CEO 03-13. Therefore, if a vote by the Board will have a financial effect, great or small, on the parent company of the Board member's employer, he should treat the measure as a voting conflict and respond in accordance with the statutory provisions detailed above. Given his status as an appointed state officer, this means he will not be prohibited from voting on the measure, but he must, prior to any participation in the matter, disclose the nature of his interests in the manner set forth in the statutes above.[14]

Here, any vote approving a project agreement with Gator Campus Energy will have an economic effect on DG Concession Holdings and, by extension, its parent company, NEE. While the exact financial effect on NEE may be unclear—and while it may not rise to the level of creating a conflict of interest for the Board member under Section 112.313(7)(a) (See Question 1, above)—it is inevitable that NEE will receive some financial gain or loss from an agreement with its subsidiary. Since NEE is the parent organization of FPL, and since FPL employs the Board member, he will have a voting conflict concerning any project agreement with Gator Campus Energy, and should respond in accordance with the statutory provisions cited above.[15]

Question 2 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 4, 2022, and **RENDERED** this 9th day of March, 2022.

_____

John Grant, *Chair*

[1]Section 7(d) of Article IX of the State Constitution allows the Governor to appoint fourteen of the seventeen members of the Board, subject to confirmation by the State Senate. See also Section 1001.70(1), Florida Statutes.

[2]Section 1000.21(6), Florida Statutes, lists the institutions included in the State University System.

[3]While Section 7 of Article IX of the State Constitution states the Board "shall operate, regulate, control, and be fully responsible for the management of the whole university system," it also states the local boards of trustees are responsible for administering each constituent university.

[4]In particular, you indicate the Board member owns 144,977 shares of stock in NEE and has an additional 15,940 shares in a retirement savings plan.

[5]Publicly available information compiled on December 31, 2016, indicates NEE has 864 subsidiaries operating in the United States and 187 other subsidiaries worldwide. See https://www.sec.gov/Archives/edgar/data/37634/000075330817000060/nee-12312016ex21.htm.

[6]You state DG Concession Holdings is wholly owned by DG 1, which in turn is wholly owned by ESI Energy, LLC, which in turn is wholly owned by NextEra Energy Resources, LLC, which is a wholly owned subsidiary of NextEra Energy Capital Holdings, Inc., which a wholly owned subsidiary of NEE.

[7]You relate the other two companies partnering in Gator Campus Energy—those companies being Star America and Sacyr—are not NEE subsidiaries.

[8]The boards of trustees of institutions within the State University System have the authority to enter into contracts on behalf of their respective institutions pursuant to Board of Governors Regulation 1.001(2)(g).

[9]You do indicate UF must annually report to the Board on the status of the project, and, if there is a material change in the project agreement, the Board's guidelines for capital projects require UF to obtain the Board's approval before the agreement can be amended.

[10]A "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 a business entity.

[11]The only exception occurs when a parent company serves solely as a holding company for the stock of a wholly owned subsidiary. In such an instance, the parent company and the subsidiary company can be treated as the same "business entity." See CEO 09-2, Question 1, and CEO 94-5, Question 2. However, there is no indication here that NEE's sole function is to serve as the holding company for DG Concession Holdings, such as would be needed to treat the two corporations as the same "business entity" for purposes of Section 112.313(7)(a).

[12]Even if NEE and DG Concession Holdings are considered to be doing business due to the corporate parent relationship, we have advised that Section 112.313(7)(a) does not prohibit a public officer from being employed by, or having a contractual relationship with, a

business entity that is doing business with another business entity, which, in turn, is doing business with or is regulated by the officer's public agency. See CEO 93-11.

[13]The phrase "special private gain or loss" is defined in Section 112.3143(1)(d), Florida Statutes, to mean "an economic benefit or harm â€¦."

[14]While not quoted herein, Section 112.3143(4) contains additional language clarifying how an appointed officer shall make the required disclosure in the event that he or she wants to participate in the matter.

[15]In addition, while the Board member does own stock in NEE that may be affected were its subsidiary to secure the project agreement, we do not find the potential economic effect on him will trigger a voting conflict under Section 112.3143(2). Section 112.3143(1)(d)1., Florida Statutes, requires the Commission to consider the "size of the class" that will be affected by a vote when considering whether a vote presents a conflict. Given the fact that NEE is a publicly-traded corporation and that the Board member's ownership comprises less than .0001% of its stock, it appears any financial effect on the Board member will not be "special," as would be needed to find a voting conflict.

CEO 22-3—June 8, 2022

CONFLICT OF INTEREST

DEVELOPMENT COMPANY DONATING LAND TO FLORIDA'S TURNPIKE ENTERPRISE

To: Nicola Liquori, Executive Director (Florida's Turnpike Enterprise)

SUMMARY:

The Executive Director of Florida's Turnpike Enterprise will not have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if a development company that employs her husband donates land to her agency for the construction of an interchange on Florida's Turnpike, so long as she does not have employment or a contractual relationship with the development company or the investment group funding the development. Guidance is provided regarding the Executive Director's husband potentially joining the investment group. Referenced are CEO 79-16, CEO 81-47, CEO 82-13, CEO 92-43, CEO 99-13, CEO 04-17, CEO 05-14, CEO 08-12, CEO 10-9, CEO 11-5, CEO 12-2, CEO 14-4, CEO 15-11, and CEO 17-12.

QUESTION 1:

Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company that employs her husband donates land to her agency for the construction of an interchange?

This question is answered in the negative.

In your letter of inquiry, you indicate that you serve as the Executive Director of Florida's Turnpike Enterprise (Enterprise). In your letter, you explain that, among your numerous responsibilities, you are tasked with the evaluation of new interchanges (access points) along the Florida's Turnpike Mainline. You also explain that your husband works for a real estate development company (Developer) that executed a purchase of land funded by an investment group that is organized as a limited liability company (the LLC). According to an article you attached to your letter, the land is known as Green Island Ranch and is approximately 6,000 acres; according to you, the land is adjacent to Florida's Turnpike Mainline in Osceola County.

You state that the construction of an interchange to Florida's Turnpike Mainline somewhere on Green Island Ranch is being contemplated and that you expect the Developer will likely discuss the matter with Osceola County and the Enterprise in the future. On the phone, you explained to Commission staff that the Osceola County Master Plan has accounted for an interchange to be built on Green Island Ranch since a time well before the Developer made the purchase. In your inquiry, you explain that, for the interchange to occur, there would not be a sale of land to the Enterprise; instead, the Developer would donate the land to the Enterprise and would not provide any remuneration or services to the Enterprise. The Enterprise would then facilitate the construction of an interchange.

With that background, you ask whether you will have a conflict of interest if the Developer donates land to the Enterprise for the construction of an interchange.

Relevant to this inquiry, Section 112.313(7)(a), Florida Statutes, states:

> 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 an agency that is regulated by or is doing business with his or her agency. The second clause of this statute prohibits a public officer or employee from having employment or a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. Pursuant to Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), the second clause is designed to prohibit a situation that creates a "temptation to dishonor" one's public responsibilities. The statute is entirely preventative and does not require an actual transgression to occur for a conflict of interest to be found. CEO 05-14.

We find that you will not have a conflict under the first clause of Section 112.313(7)(a) if the Developer donates land for the interchange to the Enterprise. Firstly, according to you, you currently do not have employment or a contractual relationship with the Developer or with the LLC. Secondly, the Commission has found that the donation of property to an agency does not constitute "doing business" for purposes of Section 112.313(7)(a). See CEO 82-13. For these two reasons, you will not have a conflict of interest under the first clause of Section 112.313(7)(a) if the Developer donates the land to the Enterprise. While your husband does have employment with the Developer, as we noted in CEO 12-2, "Section 112.313(7)(a) applies only to the official—not to his or her spouse." CEO 12-2 (citing CEO 92-43 and the opinions cited therein).

Additionally, because you do not have employment or a contractual relationship with the Developer or the LLC, the donation will not cause you to have a conflict of interest under the second clause of Section 112.313(7)(a), either.

For these reasons, if you do not hold employment or a contractual relationship with the LLC or the Developer, then you will not have a conflicting contractual relationship under Section 112.313(7)(a) should the Developer donate land to the Enterprise for the construction of an interchange.

Question 1 is answered accordingly.

QUESTION 2:

Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company that employs her husband donates land to the agency for the construction of an interchange while the Executive Director is an investor in the subject property?

This question is answered in the affirmative.

Although you currently are not an investor in the LLC that is funding the development of Green Island Ranch, you contemplate in your inquiry that you might have the opportunity in the future to become an investor in the LLC. As noted above, the Developer may eventually donate land to the Enterprise for the construction of an interchange and you, as Executive Director of the Enterprise, are responsible for approving new interchanges to Florida's Turnpike Mainline.

We have found in the past that those who own stock in a business entity have a contractual relationship with that business entity. See CEO 79-16, CEO 99-13, and CEO 11-5. If you, as the Executive Director of the Enterprise, become an investor in the LLC, then you will be considered to have a contractual relationship with the LLC.

We have found prohibited conflicts of interest to exist under the second clause of Section 112.313(7)(a) when a public officer or employee has employment or a contractual relationship with a business entity and the exercise of their official judgment could affect the business entity. In CEO 04-17, Question 3, we found that a school teacher would have a prohibited conflict of interest under this provision if he privately tutored his own students for compensation outside of school. In CEO 14-4, where a former FDOT employee had a pension fund with a former employer and the pension fund was at least partially invested in the former employer's own stock, we found that the FDOT employee would have a prohibited conflict of interest under the second clause of Section 112.313(7)(a) if he participated in the selection process for an engineering consulting firm and if the

former employer was an applicant for the contract. There, we reasoned that the employee would be tempted to dishonor his public responsibilities because he stood to gain from FDOT awarding the contract to his former employer.

In your situation, you will have a contractual relationship with an entity (the LLC) and your investment in that entity could potentially benefit from the execution of your public responsibility as Executive Director to favorably evaluate a new interchange to Florida's Turnpike Mainline on the Green Island Ranch land donated by the Developer and funded by the LLC. As was the case in CEO 14-14, the potential benefit to your investment could tempt you to dishonor your public responsibilities or otherwise affect your objectivity in the evaluation of a proposed interchange on the donated land. For that reason, we find that you will have a prohibited conflict of interest under the second clause of Section 112.313(7)(a) if you invest in the LLC and the Developer donates land to the Enterprise to construct an interchange.

Question 2 is answered accordingly.

QUESTION 3:

> Will a prohibited conflict of interest exist for the Executive Director of Florida's Turnpike Enterprise if a property development company donates land to the agency for the construction of an interchange and the Executive Director's husband becomes an equity partner in the development company or an investor in the subject property?

This question is answered as follows.

You relate that, currently, your husband is an employee of the Developer and not an equity partner. Also, at present, you state that he is not an investor in the LLC. You note, however, that he may soon become an equity partner in the Developer and may be presented with an opportunity to invest in the LLC.

If your husband becomes an equity partner in the Developer or if he invests in the LLC, that will not change the above analysis for Section 112.313(7)(a). The prohibitions of Section 112.313(7)(a) pertain to conflicting employment or contractual relationships that a public officer or public employee may have, but it does not apply to those relationships maintained by one's spouse. See CEO 12-2 and CEO 15-11.

However, a discussion of Section 112.313(3), Florida Statutes, is warranted by this question. Section 112.313(3) states in the relevant part:

> 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 officerâ€™s or employeeâ€™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.

Section 112.313(3) is a statutory provision with two separate prohibitions. The first prohibition concerns a public officer or employee who is purchasing, renting, or leasing realty, goods, or services for his or her own agency from a business entity of which he or she, or his or her spouse or child, is an officer, partner, director, proprietor, or the owner of a greater-than-five-percent interest in the business entity. The second prohibition concerns a public officer or employee who is essentially acting on behalf of a business entity to sell, rent, or lease realty, goods, or services to his or her own agency or any agency of his or her political subdivision. In CEO 17-12, Question 1, we found that a donation of land to an agency would not constitute purchasing/selling, renting, or leasing under Section 112.313(3) and, thusly, the donation would not create a prohibited conflict of interest under either of the statute's prohibitions.

We find that your husband's elevation to an equity partner of the Developer will not create a prohibited conflict for you under Section 112.313(3) because that prohibition is not applicable when the transaction between the business entity and the agency is a donation, as is the case here.

Although you will not incur a prohibited conflict of interest under either Section 112.313(3) or Section 112.313(7)(a) if your husband becomes an equity partner in the Developer or an investor in the LLC, we caution you that his status as an equity partner in the Developer or as an investor in the LLC could be rife with ethically complex scenarios for you, and may make your ethical obligations and stewardship of the public trust even more complicated to manage. The construction of an interchange on Green Island Ranch is a market maker that creates immense value in the surrounding land, and amounts to an inherent profit to all stakeholders in the development deal; in that light, we deem it prudent to highlight your other ethical obligations under the Code of Ethics.

We draw particular attention to the prohibitions in Article II, Section 8(g)(2), Florida Constitution,[1] and Section 112.313(6), Florida Statutes,[2] which essentially operate to prohibit you from misusing or abusing your public position or the resources of your position to benefit yourself or your husband, among others. If your husband becomes an equity partner in the Developer or joins the investment group of the LLC, then every official action you take to advance the construction of the interchange will have an attendant, pecuniary benefit to your husband; an official action and a benefit to your husband are two of the three elements necessary to prove prohibited conduct under these provisions. The third element is a wrongful or corrupt intent. We caution you to ensure that every official decision that you make as Executive Director related to Green Island Ranch is firmly rooted in a valid public purpose and is consistent with the proper performance of your public duties. Absent an articulable public purpose, this third element will be met and a violation of these provisions could be found. We experience discomfort that this guidance rests solely on the intent motivating your official actions, given that the presence of a public purpose often hinges on dynamic factors and can quickly dissipate. We also are aware of the great financial benefit for your husband if the interchange proceeds with his involvement. We cannot say at this point, however, that a corrupt intent can be presumed. 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 81-4781-47. For this reason, we can only caution you again that, while the situation presented in this Question does not automatically present a prohibited conflict of interest, without a valid public purpose, your actions concerning the interchange may be found to be for the sole benefit of your husband, and a violation of the prohibitions in Article II, Section 8(g)(2), Florida Constitution, and Section 112.313(6), Florida Statutes, may be found.

Additionally, we also highlight the following additional standards.

Section 112.313(8), Florida Statutes,[3] will operate to prohibit you from sharing any nonpublic information you obtain by means of your public position that relates to Green Island Ranch with your husband, the LLC, the Developer, or anyone else, if it might benefit you or any other person or business entity.

Section 112.313(2), Florida Statutes,[4] will operate to prohibit you from soliciting or accepting anything of value based on an understanding that your official action or judgment will be influenced.

Further, Section 112.313(4), Florida Statutes,[5] will operate to prohibit you or your husband from accepting anything of value where you know or should know that it is being given in an effort to influence you. See generally CEO 10-9. If, for example, the equity partnership in the Developer or the investment opportunity in the LLC were offered to your husband to influence your official decision making, or if either opportunity were offered to him at less than "arm's length," then Section 112.313(4) would operate to prohibit his acceptance. See CEO 08-12, Question 2.

Question 3 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 2022, and **RENDERED** this 8th day of June, 2022.

John Grant, *Chair*

[1]Article II, Section 8(g)(2), Florida Constitution, 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.

[2]Section 112.313(6), Florida Statutes, states in the relevant part:

> 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.

[3]Section 112.313(8), Florida Statutes, states:

> 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.

[4]Section 112.313(2), Florida Statutes, states: No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

[5]Section 112.313(4), Florida Statutes, states: No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity. (Emphasis added.)

CEO 22-4—September 14, 2022

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 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.

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. . . .

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.Â 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]

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.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 9, 2022, and **RENDERED** this 14th day of September, 2022.

_____

John Grant, *Chair*

[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.

[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.Â

[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.

[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. We caution you that, in general, it may be inappropriate and harmful to the public's confidence in government for a public officer on the governing board of an agency to threaten to sue his or her own agency for the primary purpose of leveraging a particular policy action by the agency.

CEO 23-2—March 15, 2023

CONFLICT OF INTEREST; VOTING CONFLICT

MEMBER OF PROPERTY OWNERS ASSOCIATION SERVING ON THE WEST VILLAGES IMPROVEMENT DISTRICT BOARD OF SUPERVISORS

To: Lindsey Whelan, Counsel to the District (West Villages Improvement District)

SUMMARY:

A member of the West Villages Improvement District Board of Supervisors will have a prohibited conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes, where he is a member and an officer of a homeowners' association suing his agency and where he is the designated corporate representative of the homeowners' association in the lawsuit. The Board Member would not have a voting conflict if he voted on matters pertaining to the litigation, due to the size of the class of people affected by such a vote, but the Board Member is encouraged to abstain from such a vote pursuant to Section 286.012, Florida Statutes, to avoid any appearance of impropriety. CEO 77-14, CEO 77-32, CEO 82-14, CEO 84-80, CEO 89-24, CEO 86-41, CEO 90-20, CEO 98-11, CEO 08-22, CEO 10-2, CEO 14-12, CEO 17-4, CEO 19-1, CEO 21-7, and CEO 22-5 are referenced.

QUESTION 1:

Will a member of the West Villages Improvement District Board of Supervisors have a prohibited conflict of interest if he maintains a membership in the nonprofit corporation functioning as the homeowners' association for a community within the District, serves as an officer on that nonprofit corporation, and serves as the designated corporate representative of the nonprofit corporation in a lawsuit against the District?

This question is answered as follows.

You write your inquiry on behalf of a member ("the Board Member") of the West Villages Improvement District Board of Supervisors. According to your inquiry, the Board Member was elected to a four-year term in November 2022. The Board Member was sworn in and seated on December 15, 2022, at which meeting he requested that you, as District counsel, seek this opinion. The Board of Supervisors has five members. At present,[1] four of the seats on the Board of Supervisors are elected on a one-acre, one-vote basis, but the seat occupied by the Board Member is filled through a district-wide election by qualified electors of the West Villages Improvement District ("the District") rather than on a one-acre, one-vote basis.

The District spans nearly 12,000 acres. Within the bounds of the District lies the Gran Paradiso community, which spans approximately 1,000 acres and has approximately 1,935 residential units. The Gran Paradiso community is operated by the Gran Paradiso Property Owners Association ("the Property Owners Association"). The Board Member owns one residential property within the bounds of the Gran Paradiso community and, for that reason, is required to be a member of the Property Owners Association, which is a nonprofit corporation serving as a homeowners' association pursuant to Chapter 720, Florida Statutes.[2] In addition to being a member of the Property Owners Association, and prior to his election to the Board of Supervisors, the Board Member became a member of the Board of Directors of the Property Owners Association ("Board of Directors") in March 2022.

The District and the Property Owners Association transact business together through the District's provision of irrigation water to the Property Owners Association.[3] In December 2020, the Property Owners Association began contracting with the District for the provision of irrigation water at specified rates. Recently, the Property Owners Association initiated a lawsuit against the District, disputing the service and seeking lower rates for the Property Owners Association.[4] The Board Member has been heavily involved in the lawsuit.

According to your inquiry, he has recently served as the designated corporate representative of the Property Owners Association in the lawsuit, though other corporate officers were available to do so instead, and began testifying as a witness against the District at a preliminary evidentiary hearing in December 2022 regarding a motion for preliminary injunction.[5]

With this background, you ask whether the Board Member's relationship with the Property Owners Association creates a prohibited conflict of interest for him.

To answer this question, analysis under Section 112.313(7)(a), Florida Statutes, is needed. Section 112.313(7)(a) states:

> 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.

There are two prohibitions in Section 112.313(7)(a). The first prohibition of this statute proscribes a public officer from having any contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second prohibition of this statute proscribes a public officer from having a contractual relationship that would create a continuing or frequently recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. This requires an examination of the public officer's duties and a review of his or her private employment or contractual relationship "to determine whether the two are compatible, separate and distinct or whether they coincide to create a situation which tempts dishonor." Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982) (internal quotations omitted).

Regarding the first part of Section 112.313(7)(a), we have opined in the past that a public officer's rank-and-file membership in a nonprofit corporation creates a contractual relationship between the public officer and the nonprofit corporation. See CEO 19-1, CEO 14-12, and CEO 10-2. We have also opined that "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." CEO 86-24. Initiating, maintaining, and settling a lawsuit between a business entity and an agency, however, does not constitute "doing business" under the first part of Section 112.313(7)(a). See CEO 22-5, CEO 17-4, and CEO 77-14.

We now analyze the Board Member's situation under the first part of Section 112.313(7)(a). The Board Member has a contractual relationship with the Property Owners Association because he is a member of the nonprofit corporation. While the lawsuit does not constitute "doing business" under the first part of Section 112.313(7)(a), we nonetheless find that the Property Owners Association is doing business with the District because it has contracted with the District for the purchase of irrigation water. The arrangement constitutes "doing business" because the Property Owners Association could initiate, and in fact, has initiated, a cause of action against the District to resolve rights and obligations under that contract. Where the Board Member has a contractual relationship with the Property Owners Association (through his nonprofit membership) and that entity is doing business with the District (through the irrigation water contract), the elements of the first prohibition of Section 112.313(7)(a) are met. In the absence of an exception, a prohibited conflict of interest would be created.

An exception, however, is applicable to negate the conflict. Section 112.313(12)(c), Florida Statutes, says that no person shall be held in violation of Section 112.313(7)(a) where "[t]he purchase or sale is . . . for any utilities service[.]" In CEO 86-41, we found that a city's sale of water to a private business entity that retained a city council member as an engineer was a purchase or sale for a utility service that qualified for this exception. Here, in the Board Member's case, where we also have the sale of water by an agency to a private entity, the exception also applies to negate the conflict.[6]

We turn now to our analysis under the second part of Section 112.313(7)(a). We have in the past reviewed similar situations to make a determination as to whether a public officer's private contractual relationships coincide with his or her public duties to create a situation that tempts dishonor as Zerweck requires.

For example, in CEO 82-14, we determined that membership in a voluntary, unincorporated association constituted a contractual relationship with a business entity, but that mere membership in that association, without additional facts indicating the public officer could be tempted to dishonor their public responsibilities, was not enough to find a continuing and frequently recurring conflict under the second part of Section 112.313(7)(a).

In CEO 90-20, a member of an unincorporated association challenging the city's special tax assessments in court was elected to the city council. Upon his election, he resigned his post as chairman of the unincorporated association and had his name removed as one of the named plaintiffs in the class action lawsuit. Under those facts, specifically relying upon the councilmember's efforts to divorce himself in his private capacity from the ongoing lawsuit and remove himself as a representative of the group in the lawsuit, we found no prohibited conflict of interest under the second part of Section 112.313(7)(a), even though he remained a member of the association.

In CEO 08-22, we considered a city councilmember who was a member and the chairman of a registered political action committee that was suing his city. The city councilmember terminated his service as an officer or director of the political action committee, though he continued to be a dues-paying member of it. We found that where the councilmember merely had membership in the organization that was suing his agency, but was not an officer or director, a prohibited conflict of interest was not created under the second part of Section 112.313(7)(a).

It is clear from these three opinions that while membership in an unincorporated association or political action committee creates a contractual relationship with that entity, that membership is not enough to create a continuing or frequently recurring conflict under the second part of Section 112.313(7)(a). However, when the membership is coupled with an additional incentive to compromise one's public duties, such as serving as an officer or director of the organization, or serving as its designated corporate representative in litigation, the prohibition in the second part of the statute will apply.

We believe the analytical framework set forth in CEO 82-14, CEO 90-20, and CEO 08-22 is applicable to members of nonprofit corporations, as well. In the Board Member's case, a conflict of interest under the second part of Section 112.313(7)(a) will be present if he continues to be a representative of the Property Owners Association (nonprofit corporation) in the lawsuit and continues to be an officer in the Property Owners Association (nonprofit corporation) while he maintains a membership in the nonprofit organization and holds office on the Board.[7] While he serves as an officer and as a designated corporate representative of the Property Owners Association, he is in a situation where he owes obligations to those on both sides of the lawsuit and he could be tempted to compromise his public responsibilities.

To avoid a conflict of interest going forward, he should either (1) end his membership in the Property Owners Association (eliminating the contractual relationship that is a predicate to finding a violation),[8] (2) resign as an officer of the Property Owners Association and remove himself from all representative capacities in the lawsuit (eliminating the facts and circumstances that might tempt him to dishonor his public responsibilities), [9] or (3) leave his public position.[10]

QUESTION 2:

Would the Board Member have a voting conflict if the Board were posed with a vote concerning the litigation between the District and the Property Owners Association?

This question is answered as follows.

You ask whether a voting conflict will exist if the Board Member votes on a matter pertaining to the litigation between the District and the Property Owners Association.

Section 112.3143(3)(a) provides:

> 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 corporation parent 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 insure to the special private gain or loss of a relative or business associate of the public officer.

The statute prohibits the Board Member from voting on any measure that will inure to his special private gain or loss, or to the special private gain or loss of a principal by whom he is retained, a relative, or a business associate. There is nothing in the facts presented to indicate that a principal by whom the Board Member is retained, a relative, or a business associate would be affected by a vote pertaining to the litigation. The Property Owners Association is not a principal by whom the Board Member is retained because it does not compensate him. See CEO 84-800. Therefore, we are only concerned with whether the vote would create a special private gain or loss for the Board Member himself.

We have opined before that where the size of the class of people affected by a vote is sufficiently large, and a public officer's proportional interest in the class of those affected by the vote is sufficiently small, a public officer's gain or loss from the vote cannot be said to be "special" as would be required to find a voting conflict under Section 112.3143(3).

Here, although a vote relating to the litigation could create a gain or loss for the Board Member himself, depending on the specific nature of the vote, he is just one member of the Property Owners Association, which has 1,935 residential units[11] that would be affected in substantially the same manner by the litigation. For this reason, a voting conflict would not be created if the Board Member voted on a matter pertaining to the litigation.[12] That being said, we believe voting on such a matter would create the appearance of impropriety and raise questions about the Board Member's objectivity, given his private interests and level of involvement in the lawsuit. We do not think it would instill public confidence in government for the Board Member to participate in such a vote and we would strongly encourage him, as we suggested to a similarly-situated public officer in CEO 21-7, to invoke Section 286.012, Florida Statutes, and abstain from such a vote, instead.[13]

If the Board Member does choose to vote on such a matter, he must take great care not to violate Section 112.313(6), Florida Statutes, and Article II, Section 8(h)(2), Florida Constitution, which prohibit public officers and employees from abusing or misusing their positions with a wrongful intent to achieve a benefit for themselves or certain others.

QUESTION 3:

> Would the Board Member have a prohibited conflict of interest if a nonprofit corporation and political committee of which he is an officer, or the Board Member personally, litigate against the City of North Port?

This question is answered in the negative.

In your inquiry, you explain the Board Member also is the chairman of West Villagers for Responsible Government, Inc. ("WVRG"), a nonprofit corporation and a political action committee. In October 2020, WVRG began petitioning the City of North Port ("the City") to de-annex a significant portion of lands from the City's geographical boundaries. These lands, however, also fall within the District's boundaries. In October 2022, the City rejected the petition to de-annex. In December 2022, WVGR and the Board Member in his personal capacity filed a Petition for Writ of Certiorari with the Twelfth Judicial Circuit Court to quash the City's order regarding de-annexation. While the District is not a party to the litigation, you estimate it could incur substantial costs as a consequence of the proposed de-annexation, including costs to renegotiate agreements with the County, costs to obtain permits with the County, and legal and engineering costs to amend its enabling legislation and effectuate the separation from the City.

With this background, you ask whether the Board Member will have a prohibited conflict of interest as a result of the litigation with the City.

Even assuming the Board Member holds a membership in WVRG, there is no indication that WVRG is doing business with or is regulated by the District, which is the Board Member's agency. Thus, there is not a conflict under the first part of Section 112.313(7)(a). Regarding the second part of Section 112.313(7)(a), once again assuming that the Board Member holds a membership in WVRG, there is no indication that the Board Member's public responsibilities to the District bear any relation to the lawsuit against the City. The District is not a party to the case and there is no official decision-making to be taken by the Board of Supervisors that would affect the course of the litigation. Although the District could have substantial costs as a consequence of the lawsuit, those costs are not damages or fees derived from engagement in the litigation, but business expenses that will be necessary to adapt to a ruling that orders de-annexation. Because the public position of the Board Member and his private interests concerning the City lawsuit do not coincide to tempt him to dishonor his public responsibilities, there is no conflict under the second part of Section 112.313(7)(a).[14]

You ask whether District votes regarding development matters in the proposed de-annexation areas would create a voting conflict for the Board Member. Because it does not appear that votes on development in the de-annexation areas would create a special private gain or loss for the Board Member or any relative, business associate, or principal by whom he is retained, there is no voting conflict under Section 112.3143(3).

Your questions are answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 10, 2023, and **RENDERED** this 15th day of March, 2023.

Glenton "Glen" Gilzean, Jr., *Chair*

---

[1] Originally, all five of the Board seats were elected on a one-acre, one-vote basis. See Chapter 2004-456, Section 5(1), Laws of Florida. In compliance with Section 189.041(3), Florida Statutes, the composition of the Board has begun to transition such that one of the Board seats is elected by the qualified electors of the District.

[2] Section 720.301(9), Florida Statutes, defines a "homeowners' association" as:

> a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. The term "homeowners' association" does not include a community development district or other similar special taxing district created pursuant to statute.

Relevant to this inquiry, a homeowners' association has the power to commence litigation. Section 720.303(1), Florida Statutes, states in part:

> Before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000, the association must obtain the affirmative approval of a majority of the voting interests at a meeting of the membership at which a quorum has been attained.

[3] Your inquiry does not detail any other ongoing business transactions between the District and the Property Owners Association.

[4] We note that the Board Member has contacted Commission staff to dispute the Requestor's (District counsel's) description in the ethics inquiry of certain details pertaining to the lawsuit. The particulars of the lawsuit are not relevant to this opinion, except than that there is a lawsuit and the Board Member is involved in it, and there seems to be no material dispute over those two facts. To the extent that the Board counsel who requested the opinion and the Board Member seem to disagree over the facts, we reassure both that the differences are immaterial for purposes of this analysis.

[5] Apparently, direct testimony had occurred, but cross-examination and redirect had not. Further hearings are scheduled for February 2023 and it is expected the Board Member's witness testimony would conclude then.

[6] A second, though less permanent, exception is also available. We have found in the past that Section 112.316, Florida Statutes, operates to effectuate a "grandfathering" of a contractual relationship where a public officer's contractual relationship with a business entity and that business entity's "doing business" relationship with the public officer's agency both precede the public officer's assumption of office, at least until the contract terms are changed or amended. See CEO 22-5 for a lengthy discussion of grandfathering under Section 112.316 as applied to conflicts under the first part of Section 112.313(7)(a).

[7] We are not aware of any exceptions that would be applicable to the scenario presented to negate the conflict. We find that the exception in Section 112.313(7)(a)1., Florida Statutes, does not apply here given that the conflict derives from the representation of a business entity before and/or against the Board Member's agency. As we opined in CEO 77-32, the exception does not apply to negate a conflict of this nature. The exception found in Section 112.313(15), Florida Statutes, which creates an exception for those who are employed by a tax-exempt organization under s. 501(c) of the Internal Revenue Code and meet certain other criteria, is also not applicable. As we discussed in CEO 98-11, Note 2, this exception "speaks to the holding of employment and not the holding of a contractual relationship," and the Board Member is not employed by the nonprofit corporation; he holds a contractual relationship with it through his membership.

[8] We recognize the difficulties with this option given that "membership [in the homeowner's association] is a mandatory condition of parcel ownership." § 720.301(9), Fla. Stat.

[9] Assuming the Board Member is offering uncompensated testimony (e.g., that he is not an expert witness that has been retained to testify against his agency), we believe the Board Member can continue to be a fact witness in the case. See CEO 91-66 and CEO 94-32. The Code of Ethics does not operate to prevent public officers from offering uncompensated, truthful testimony in a court of law, even if that uncompensated testimony might serve interests counter to the agency's position in the litigation.

[10] In correspondence and telephonic communications with Commission staff, the Board Member has asked whether abstaining from votes concerning the lawsuit would cure his conflicting contractual relationship. As we opined in CEO 94-5:

> Compliance with the voting conflicts law (Section 112.3143, Florida Statutes), which would include abstention from voting or participation in matters involving [those with whom the public officer has a contractual relationship], does not obviate the conflict under Section 112.313(7)(a). Nothing in Section 112.313(7)(a) indicates that compliance with Section 112.3143 creates an exemption from [its] application . . . . Moreover, we do not believe that abstention should have the effect of creating an exemption, because [a public officer's] duties are not confined to voting on or participating in matters which come before [his or her board] for formal consideration[.]"

See also CEO 12-9; accord In re Milton West, Complaint No. 16-032, Final Order No. 17-057, aff'd by sub nom. Milton West v. Comm. On Ethics, 5D17-2075 (Fla. 5th DCA 2018).

[11] The Board Member has informed Commission staff he believes there are over 1,800 individual property owners of the 1,935 residential units in the Gran Paradiso community.

[12] We note that the exception to the voting conflict law found in Section 112.3143(3)(b), Florida Statutes, does not apply to the Board Member because the Board Member was not elected on a one-acre, one-vote basis, even though his colleagues on the Board were.

[13] Section 286.012 allows a public officer to abstain from a vote if there is or appears to be a possible conflict under Section 112.3143 or Section 112.313. If a public officer does abstain for that reason, Section 286.012 requires them to comply with the disclosure requirements of Section 112.3143.

[14] If, however, the District joins the lawsuit at some point, then the facts will resemble the scenario presented in Question 1.

CEO 23-5—August 3, 2023

ABUSE OF POSITION; MISUSE OF PUBLIC POSITION; CONFLICT OF INTEREST; GIFT PROHIBITIONS

STATE UNIVERSITY BOARD OF TRUSTEES MEMBER AUTHORING CONTENT FOR PUBLICATIONS REGARDING MATTERS RELATED TO HIS STATE UNIVERSITY

To: Name Withheld (New College of Florida)

SUMMARY:

A trustee of a state university is not prohibited, in his private capacity, from writing and accepting payment for publishing content on written or online media platforms concerning matters related to the university, provided the content concerns only publicly available information. Additional guidance is provided concerning whether the contractual relationships formed due to his journalism present a prohibited conflict of interest for him, and whether he is limited in soliciting personal donations through the online media platform. Referenced are CEO 23-1, CEO 22-4, CEO 22-3, CEO 19-13, CEO 16-2, CEO 16-1, CEO 08-20, CEO 08-19, CEO 08-2, CEO 06-6, CEO 95-28, CEO 92-21, CEO 90-15, CEO 89-21, and CEO 86-6.

QUESTION 1:

Would a member of the board of trustees for an institution within the State University System be in violation of the statutory and Constitutional prohibitions over which the Commission has jurisdiction were he to author and accept payment for content related to the institution?

Question 1 is answered as follows.

In your letter of inquiry and additional information provided to our staff, you indicate you are the General Counsel for New College of Florida (NCF), a public liberal arts college in the State University System of Florida. You are bringing this inquiry on behalf of a recently appointed member of the University's Board of Trustees.[1] You indicate the Trustee produces newsletters, commentaries, and videos for two different platforms —a written journal published by the Manhattan Institute for Policy Research and an online service called *Substack*. The Trustee would like to publish content related to NCF on these platforms, and promote such content through his *Twitter* account. He inquires whether this constitutes a prohibited conflict of interest with his role as a NCF Trustee. Before engaging in legal analysis, the following discussion is offered concerning the Trustee's involvement with both media platforms.

Regarding the Manhattan Institute for Policy Research, the organization is a think tank based in New York City and comprised of scholars, journalists, activists, and civic leaders.[2] The organization focuses upon offering commentary and research concerning a range of topics, such as urban affairs, policing, education, and housing. The organization's efforts include publishing the *City Journal*, which you indicate is a public policy magazine and website. The Trustee is a paid employee and director of the Manhattan Institute, and he serves as the editor for the *City Journal*. As part of his editorial duties, he writes articles, editorials, and commentaries for the *City Journal*.

Regarding *Substack*, you indicate it is an online platform for journalists and content creators where they can publish newsletters, articles, and videos, and engage in discussions with readers. The Trustee is not employed by Substack, but he has signed an agreement allowing him to have an account on its platform. On this account, he publishes articles, commentary, and videos on a variety of issues, including higher education matters. You indicate the majority of the content that the Trustee produces on *Substack* can be viewed without any monetary charge, although certain content—kept behind a paywall—requires a paid subscription. As will be explained in subsequent questions in this opinion, the money paid by subscribers is sent to a third-party payment

processor, which—in turn—takes a percentage for its services, sends a pre-set portion of the subscription fee to *Substack*, and then distributes the remaining money to the Trustee. The Trustee is not paid by *Substack*; his compensation comes from the subscriptions made to his account.

Importantly, these journalism opportunities did not arise due to his appointment to NCF's Board of Trustees. The Trustee's employment at the Manhattan Institute, his work on the *City Journal*, and his involvement with *Substack* all preceded his appointment to the Board.

You indicate that now, following his appointment, he wants to continue these journalistic endeavors, in part by publishing content in the *City Journal* and on his *Substack* account pertaining to NCF.[3] He also intends to use his *Twitter* account to draw attention to these articles. You emphasize the "strong majority of his content" for both the *City Journal* and *Substack* will not relate to NCF specifically, but will be more general in nature, concerning broader issues affecting education and schools. However, you indicate some of the content will specifically refer to and offer commentary regarding NCF, and he inquires whether this will trigger any statutory or Constitutional prohibition over which the Commission has jurisdiction.

Of note, you indicate any content generated by the Trustee concerning or referring to NCF will be non-monetized and non-paywalled, meaning this content will not generate any income for him. Because it appears he is employed by the Manhattan Institute, presumably at an established salary, this appears more relevant to content on his *Substack* account. Accordingly, from what you indicate, any content posted on his *Substack* account specifically related to or concerning NCF will be freely available, meaning it will be viewable without a paid subscription. However, you indicate even non—monetized and non—paywalled articles on *Substack* do include a link for interested readers to subscribe to the Trustee's account, as that option is built natively into the platform.

We have issued past advisory opinions regarding whether public officers may report or offer commentary for public consumption on matters affecting their public agencies. These prior opinions have analyzed this issue under two statutes, Sections 112.313(6) and 112.313(8), Florida Statutes, which state:

> 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. [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 Trustee from corruptly[4] using his public position or the resources thereof, or using "inside information," to benefit himself or any other person or entity. Also relevant—although it did not become effective until December 31, 2020—is the Constitutional prohibition found in Article II, Section 8(h)(2), Florida Constitution,[5] which provides:

> 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 the prior opinions, which are summarized below, we concluded there was no violation of Sections 112.313(6) or 112.313(8) for two main reasons: (1) any reporting or journalism was done in a private capacity, separate and apart from the use of the public officer's official position; and (2) the reporting or journalism was confined to publicly available information.[6]

For example, CEO 90-15 addressed a city commissioner who was employed by a newspaper to write columns and articles concerning the activities of the city commission. We acknowledged that using his status as a reporter to promote his stance on a political issue or to criticize the stance of an opponent might achieve a political benefit for him. Nevertheless, we concluded that he was not using his office to generate this content, as would be needed for the prohibition in Section 112.313(6) to apply. We emphasized "his actions in writing [the columns and articles] would be taken in his private capacity rather than in his public capacity." And, regarding Section 112.313(8), we concluded the statute would not be violated so long as all the information in the columns or articles that he wrote was available to the public, and could be discussed or explained with any member of the public.

More recently, in CEO 16-2, Question 3, we found no violation of Section 112.313(6) would occur if a member of a county parks and recreation council wrote columns for a local newspaper addressing matters pertaining to county parks. We wrote:

> [A]lthough your use of the newspaper could achieve benefits for you, such an action, without more, will not violate Section 112.313(6). Because you will not be acting in a public capacity by writing a column or making comments concerning park-related issues, it cannot be said that these actions will be a use of public office under Section 112.313(6).

Similarly, in CEO 92-21, we found the statutory prohibitions would not preclude a county sheriff from owning a local newspaper that was reporting on county business. We advised the sheriff that because his ownership of the newspaper was in his private capacity, and so long as he did not use public resources to produce any of its articles or columns, Section 112.313(6) would not apply. We did caution the sheriff, though, not to use confidential criminal investigative information to give his newspaper an advantage over other publications, as such conduct would violate Section 112.313(8).

And, finally, CEO 86-6 addressed whether a public employee could be paid by a newspaper for writing a job-related article. In particular, the opinion involved a chief assistant public defender who was paid $150 by a local newspaper for writing commentary on the juvenile justice system and on a particular client whom the public defender's office had represented. We found no violations of Section 112.313(6) or 112.313(8), noting that "all information contained in the commentary about the case is a matter of court record" and "was available to members of the general public[.]"

Considering the reasoning in these prior opinions, we find the Trustee will not automatically violate Section 112.313(6) or the prohibition in Article II, Section 8(h)(2), Florida Constitution, simply by reporting or publishing content related to NCF in the *City Journal* or on *Substack*. His authoring of such content will be in his private capacity; it will not be done through his public position, as would be needed for the statutory prohibition to apply. Moreover, so long as the content deals with information fully available to the public, there will be no violation of Section 112.313(8). This means, of course, that the Trustee will have to confine his articles, commentary, and videos to information derived from public records or public meetings, and he cannot use information that is exempted or not subject to the public records law. Similarly, while he can use conversations with NCF staff consisting of information that is public record and can be discussed or explained with any member of the public, any information exempted from or not subject to the Sunshine Law or the public records law should not be referenced. The Trustee will need to keep his content within these parameters to avoid a violation of the prohibitions discussed herein.[7]

We recognize an argument could be made that public officers-such as the Trustee-should not profit in any way from the information or skills that they acquire in their public positions. However, so long as the Trustee confines his articles, videos, and commentary to publicly available information, as described above, his content will not rely upon his service on the Board of Trustees and could be written by anyone. We decline to find, without more, that such actions constitute use of one's public position.

We also acknowledge that readers may be more prone to subscribe to the *City Journal* to the Trustee's *Substack* account given his newly—appointed status as a NCF Trustee, particularly if he will be publishing content related to NCF. However, the possibility that readers may be more interested in the Trustee's content due to his public position does not provide a basis for applying the prohibitions discussed above. In CEO 90-15, which dealt with a city commissioner acting as a paid reporter, we found "[a]lthough most reading the article[s] will recognize his name and know that he is a [c]ity [c]ommissioner, this factor of name recognition alone is not sufficient to constitute a use of public office. To find otherwise would prohibit a public official from engaging in almost any private business." See also CEO 16-2 (stating "that while readers might recognize [the public officer's] name on [his] articles and realize he was a public officer, name recognition [is] not sufficient to constitute a use of public office"). In other words, the possibility that the Trustee's readership and subscriptions may increase due to his public position does not automatically equate to a misuse or abuse of his public position.[8]

However, we do offer some words of caution to the Trustee. It is critical that he not use NCF personnel to prepare the content that he privately publishes. He must author the content personally-or with others not affiliated with NCF-to avoid an application of the statutory prohibitions previously discussed. Also, to prevent any confusion, when the Trustee comments on matters related to NCF, he should emphasize he is sharing only his personal opinions and not the opinions of the university board on which he serves. This will clarify he is offering only his personal opinion and is not speaking for the university itself, which could be construed as a use of his public position.

Question 1 is answered accordingly.

QUESTION 2:

> Does the Trustee have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, if he continues in his employment or contractual relationships with the media platforms for which he is publishing content?

Question 2 is answered in the negative.

In your inquiry, you indicate the Trustee seeks to clarify "whether his journalism or social media presence creates a conflict of interest with his role as a Trustee of NCF." This requires analysis beyond merely considering whether he can publish articles related to NCF in the *City Journal* and on *Substack*. His employment and contractual relationships with these media platforms also must be examined to ensure they do not create a prohibited conflict of interest.

The statute relevant to such an examination is Section 112.313(7)(a), Florida Statutes, which states:

> 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 or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7)(a) prohibits the Trustee from having employment or a contractual relationship with any agency or business entity that is subject to the regulation of, or is doing business with, his agency, which would be NCF. The second part of the statute prohibits him from having employment or a contractual relationship that will create a "continuing or frequently recurring" conflict of interest with his duties as a Trustee, or that will "impede the full and faithful discharge of [his] public duties." The following analysis will apply the statute to the Trustee's employment with the Manhattan Institute for Policy Research—which includes his service and writings for the *City Journal*—as well as his relationship with *Substack*.

Turning first to his employment with the Manhattan Institute for Policy Research, you indicate this entity is not doing business with NCF and is not subject to NCF's regulation. Assuming there is no other connection between the Institute and NCF, it does not appear this employment creates any prohibited conflicts of interest for the Trustee under Section 112.313(7)(a).

Turning next to the Trustee's relationship with *Substack*, the application of Section 112.313(7)(a) depends upon understanding how this media platform operates. As discussed in Question 1, *Substack* is an online platform on which authors can create accounts and post content, similar to having a *YouTube* channel or creating an *Instagram* account. The Trustee is not employed by *Substack* and is not paid by it. Instead, the Trustee is compensated when individuals subscribe to his account to view content kept behind a paywall. Each subscription is paid to a third-party payment processor, which separately distributes percentages of the subscription fee to *Substack* and to the Trustee.

Publicly available information indicates that authors creating an account on *Substack* have to sign a publisher's agreement. While they continue to own any original content that they post, the publisher's agreement gives *Substack* a limited license to promote that content. You indicate the Trustee entered into this publisher's agreement with *Substack* when he first established his account.

It also appears there is a contractual relationship between each *Substack* author and the third-party payment processor, inasmuch as the processor is legally obligated to remit a portion of each subscription fee to the author. To this end, the third-party payment processor must annually prepare and provide each *Substack* author with a Form 1099-K, which is a Federal form used by credit card companies and third-party payment processors to report the payment transactions that they have processed for retailers and third parties. The Form 1099-K is purely informational and does not create an employment or independent contractor relationship between the third-party payment processor and the *Substack* author. It merely summarizes the sales activity on each account, and the processor sends copies of it to both the author and the IRS.

In short, by having a *Substack* account, the Trustee has ongoing contractual relationships with both *Substack* and the third-party payment processor. The question then becomes whether either entity is conducting business with NCF or is being regulated by NCF, as would trigger the statutory prohibition in Section 112.313(7)(a). Because you indicate neither *Substack* nor the third-party payment processor have any such relationship with NCF, and assuming no other connection arises between these entities and NCF, the Trustee's contractual relationships with them do not create prohibited conflicts of interest for him under Section 112.313(7)(a).

Question 2 is answered accordingly.

QUESTION 3:

> Does the Trustee have a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, given the contractual relationship that he has with each subscriber to his online media account?

Question 3 is answered as follows.

An additional issue under Section 112.313(7)(a) concerns whether the Trustee will have a prohibited conflict of interest due to his relationship with each subscriber to his *Substack* account. From what you indicate, and as previously discussed, certain content that the Trustee posts on *Substack* can be freely accessed and viewed by any reader, regardless of whether they have subscribed to his account. This first category of readers does not create any conflicts of interest for the Trustee. However, additional content, kept behind a monetized paywall, is available only to those who have subscribed to the Trustee's account by transmitting money to the third-party payment processor. The question then becomes whether the Trustee's relationship to this second category of readers—his subscribers—could trigger the statutory prohibition in Section 112.313(7)(a).[9]

Regarding these subscribers, you indicate the Trustee has the discretion to set and modify his subscription fee without any involvement from *Substack*. Moreover, *Substack* has little to no involvement in dealing with account subscribers. You indicate that account holders, such as the Trustee, have the authority to remove subscribers from their accounts unilaterally. Moreover, *Substack's* Terms of Use indicate that it is not liable for any disagreement between its account holders and their subscribers, including disputes over the payment of subscription fees.

Considering how *Substack* operates, we find a contractual relationship exists between the Trustee and each of his subscribers. In the past, we have adopted the substantive law of contract when evaluating whether a "contractual relationship" exists for purposes of Section 112.313(7)(a), and have cited the following definition from Black's Law Dictionary (Fifth Edition, 1979) when interpreting the phrase:

> [a]ny relationship between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.

See CEO 23-1 and CEO 95-28. We also cited a similar definition in CEO 89-21, indicating:

> The term 'contract' has been defined as a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Another definition is that a 'contract' is an agreement upon a sufficient consideration to do or refrain from doing a particular law thing. [11 Fla. Jur. 2d Contracts, Section 1.]

Here, based on the Trustee's promise of allowing access to paywalled content, the subscribers provide consideration to him in the form of subscription fees paid to the third-party payment processor. *Substack* itself is not a party to this arrangement and the Trustee has the authority to end the relationship by removing individual subscribers on his own. Accordingly, it appears the Trustee has a contractual relationship with each paid subscriber to his *Substack* account.

Applying this finding to the statute, the Trustee is prohibited under Section 112.313(7)(a) from accepting or continuing a subscription with any "business entity" or "agency" that is doing business with NCF or is being regulated by NCF. Such a contractual relationship would create a prohibited conflict of interest for him under the first part of the statute. Importantly, the statutory prohibition applies only to contractual relationships with business entities[10] and agencies,[11] not private individuals. Accordingly, the Trustee should examine his subscription list to ascertain if any current subscribers are business entities or agencies engaged in a business or regulatory relationship with NCF. You indicate the Trustee is able to view the username and email address of each of his subscribers, and, to the best of his knowledge, none of his current subscribers are conducting business with NCF. We encourage him to be vigilant in this regard, if he chooses to continue allowing subscriptions to his *Substack* account.[12]

QUESTION 4:

> Do donations given to the Trustee through his online media account constitute prohibited "gifts" under Section 112.3148, Florida Statutes, or prohibited "expenditures" under Section 112.3215, Florida Statutes?

Question 4 is answered as follows.

Language on the Trustee's *Substack* page also asks readers to "become a patron" of his work by donating money to him. In particular, the Trustee's *Substack* page states, "If you want to support my work, you can contribute via credit card, PayPal, or Bitcoin." There are hyperlinks on the page taking readers to webpages where the donations can be made. The Trustee's *Substack* page also indicates, "[l]arger donors can make a tax-deductible contribution to my 501(c)(3) nonprofit" and provides information where such a contribution can be sent. You indicate any donations to the Trustee or his nonprofit are separate and apart from a subscription to his *Substack* account. In other words, a reader can donate money to the Trustee or his nonprofit regardless of whether they are a subscriber. The following analysis addresses whether the Trustee is prohibited or limited in engaging in such solicitations.

Initially, we note NCF is part of the State University System within the Executive Branch (see Section 1001.705(1)(d), Florida Statutes), and the Trustee, as a member of a state university board of trustees, must annually file the CE Form 1 ("Statement of Financial Interests"). See Section 112.3145(1)(c)3., Florida Statutes.

Accordingly, the Trustee is subject to Section 112.3148, Florida Statutes (the "gifts" law), and Section 112.3215(6)(a), Florida Statutes (the "expenditure ban"), as he is an Executive Branch agency "reporting individual" required to file financial disclosure. See CEO 16-1 and CEO 08-2, Question 2. The question then becomes what portions of the gift law and the expenditure ban will apply to the donations being solicited by the Trustee through his *Substack* account.

The statute most pertinent is Section 112.3148(3), Florida Statutes, which provides:

> A reporting individual or procurement employee is prohibited from soliciting any gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or the partner, firm, employer, or principal of such lobbyist, where such gift is for the personal benefit of the reporting individual or procurement employee, another reporting individual or procurement employee, or any member of the immediate family of a reporting individual or procurement employee.

Section 112.3148(3) prohibits the Trustee from soliciting for himself or his personal nonprofit a gift of any amount from a lobbyist of NCF,[13] the partner, firm, employer, or principal of such a lobbyist, a vendor of NCF,[14] or a political committee (hereinafter, throughout the remainder of this opinion, "prohibited sources"). See also Section 112.31485(2)(a), Florida Statutes (specifically prohibiting "reporting individuals" from soliciting gifts of any amount from political committees).

We acknowledge that the Trustee is not engaging in a direct or in-person solicitation through his *Substack* page, but is making a general or collective request for funding from anyone who wants to contribute. However, we recently found the term "soliciting," as used in Section 112.3148(3), does not have to be personal or direct, but encompasses general funding requests made collectively to a group or community. See In re Douglas Underhill, Complaint Nos. 20-060, 20-073, 20-103 (consolidated), Final Order No. 22-041.[15] Accordingly, we find the general request for donations on the Trustee's *Substack* page qualifies as "soliciting" for purposes of Section 112.3148(3).

Given the applicability of the statute, the Trustee has two choices. Clearly, he would not be in violation of Section 112.3148(3) if he were to remove all language on his *Substack* page requesting donations for himself or his nonprofit. His other choice is to keep the language requesting donations, but also specify that the prohibited sources identified above cannot contribute. Only by adding this limiting language will he be able to continue soliciting donations through *Substack* without violating Section 112.3148(3).

The following guidance is also provided concerning any donations that the Trustee may receive on behalf of himself or his personal nonprofit. If a prohibited source were to offer a donation unprompted—meaning the Trustee did not solicit it—three prohibitions will apply.

First, the Trustee, as a "reporting individual," will be prohibited from accepting a donation of any amount to himself or his nonprofit if it is offered by a political committee. Section 112.31485(2)(a), Florida Statutes, imposes a flat ban on such donations, stating:

> A reporting individual or procurement employee or a member of his or her immediate family is prohibited from soliciting or knowingly accepting, directly or indirectly, any gift from a political committee.

The only exception, described in Section 112.31485(1)(a), Florida Statutes, would be if the gift being offered by the political committee is "primarily related to contributions, expenditures, or other political activities authorized pursuant to chapter 106." Otherwise, donations to the Trustee or his nonprofit coming from political committees should be refused.

Second, any donation to the Trustee or his personal nonprofit by a lobbyist or principal of a lobbyist will be considered an "expenditure," subject to the restrictions in Section 112.3215(6)(a). The term "expenditure" is defined in Section 112.3215(1)(d) to mean "a payment, distribution, loan, advance, reimbursement deposit, or *anything of value* made by a lobbyist or principal for the purpose of lobbying." (emphasis added). While a donation to the Trustee or his nonprofit may not, at first blush appear, to be made "for the purpose of lobbying,"

the statute clarifies that "lobbying" can encompass any "attempt to obtain the goodwill of an agency official or employee." See Section 112.3215(1)(f), Florida Statutes and Rule 34-12.180, F.A.C. We find a donation to the Trustee or his personal nonprofit fits within this description.16

The question then becomes under what circumstance the Trustee can accept such an expenditure. Section 112.3215(6)(a) addresses this by stating:

> Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure.

This provision is tailored only to Executive Branch agency reporting individuals, such as the Trustee, accepting gifts from lobbyists or principals of lobbyists of Executive Branch agencies. See Sections 112.3215(1)(a) and 112.3215(1)(f), Florida Statutes. But its meaning is clear: the Trustee as an Executive Branch agency reporting individual cannot accept a donation (i.e., a goodwill-engendering "expenditure") of any amount on behalf of himself or his personal nonprofit from any Executive Branch agency lobbyists or principal. See CEO 06-6. This applies even if the lobbyist or principal has no connection to NCF, as the prohibition is an across-the-board ban on expenditures coming from any Executive Branch agency principal or lobbyist. See CEO 08-19, Question 3.

Third, even if the donation is not coming from a political committee or an Executive Branch agency lobbyist or lobbyist principal, the Trustee as a reporting individual is subject to the prohibition in Section 112.3148(4), Florida Statutes, which states:

> A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or, directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of $100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

Section 112.3148(4) prohibits the Trustee, or anyone acting on his behalf, from accepting "directly or indirectly" any donation to himself or his personal nonprofit worth more than $100 from a vendor, lobbyist, or principal of a lobbyist of NCF, or from a political committee. Please note the statutory definition of a "lobbyist" for purposes of Section 112.3148(4)—which, as previously noted, is found in Section 112.3148(2)(b)1.—does not contain the exemptions for the term found in Section 112.3215(1)(h), meaning the term as it is used in Section 112.3148 is broader than in Section 112.3215.

And, finally, if the donation to the Trustee or his personal nonprofit is coming from an individual or entity who is not a prohibited source mentioned above, he may accept the donation, but he will be subject to the reporting requirements of Section 112.3148(8), Florida Statutes. These requirements would apply, for example, if a private citizen or business entity with no connection to NCF offers a donation. Section 112.3148(8) states:

> Each reporting individual or procurement employee shall file a statement with the Commission on Ethics not later than the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of $100 in value, if any, accepted by him or her, for which compensation was not provided by the done to the donor within 90 days of receipt of the gift to reduce the value to $100 or less, except the following:
>
> 1. Gifts from relatives;

2. Gifts prohibited by subsection (4) or s. 112.313(4).
3. Gifts otherwise required to be disclosed by this section.

In essence, if the Trustee receives a donation to himself or his personal nonprofit exceeding $100 from a non-prohibited source, he must disclose it. This disclosure should be made on our Form 9, "Quarterly Gift Disclosure," by the last day of the calendar quarter following the quarter in which the donation was received. For example, if a gift is received in March, it should be reported by June 30.

Because this analysis is lengthy, the following summary is offered: (1) the Trustee must remove the solicitation for donations on his *Substack* page or add limiting language to the solicitation; (2) the Trustee must decline any donations to himself or his nonprofit from a political committee, or an Executive Branch agency lobbyist or lobbyist principal, as those terms are defined in Section 112.3215; (3) the Trustee may not accept donations to himself or his nonprofit of more than $100 from a vendor or lobbyist of NCF, as those terms are defined in Section 112148; and (4) the Trustee must report any other donations not otherwise prohibited to himself or his nonprofit of more than $100 on a quarterly CE Form 9.

Question 4 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 28, 2023, and **RENDERED** this 2nd day of August, 2023.

Glenton "Glen" Gilzean, Jr., *Chair*

[1]Section 1000.21(6)(k), Florida Statutes, lists NCF as part of the State University System, and Section 1004.32(3), Florida Statutes, authorizes the Governor to appoint all twelve members of its Board of Trustees.

[2]The information in this paragraph comes from your responses to staff inquiries, as well as from publicly available information accessed at: https://manhattan.institute/about.

[3]You indicate the Trustee authors his own content for the *City Journal* and on Substack.

[4]Section 112.312(9), Florida Statutes, defines "corruptly" as:

> . . . 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.

[5]On December 31, 2022, the constitutional subsection found in Section 8(g)(2) of Article II of the Florida Constitution was redesignated as Section 8(h)(2).

[6]Typically, we are cautious in applying Section 112.313(6) in the context of an advisory opinion, given that the statute often hinges upon evidence of a corrupt intent, which is difficult to determine outside the context of an ethics complaint, where a full investigation and administrative hearing can be conducted to collect all relevant information and judge the credibility of witness testimony. See CEO 22-4, Question 2 and CEO 22-3, Question 2. However, the opinions cited herein did not need to reach the question of corrupt intent, as they determined Section 112.313(6) was inapplicable on an alternate basis, namely the lack of public capacity conduct.

[7]So long as the Trustee follows this guidance, he also will not violate these prohibitions by posting about his content on *Twitter*. While ultimately not integral to the analysis herein, we note you have indicated the Trustee is not compensated for his *Twitter* postings.

[8]We note the Trustee also intends to identify himself as a NCF Trustee in the "author biography" on his *Substack* account. While this may be, in a strict sense, a "use of position" under Section 112.313(6), we have found the mere identification of one's title, without more, does not suggest the type of wrongful intent, or the type of action inconsistent with the proper performance of public duties, necessary to constitute "corrupt" conduct under the statute. See CEO 19-13, Question 3 (finding a police chief could identify himself by title when engaging in fundraising for a nonprofit, provided he obtained permission from the city manager) and CEO 08-20 (finding a State Senator would not be in violation of Section 112.313(6) were he to allow his private equity firm to identify his public position in memoranda and publications).

[9]Because the Trustee's subscriptions are being given in exchange for a particular consideration—namely, the ability to access the paywalled content—we find the subscription fees are not "gifts" or "expenditures." See Section 112.312(12)(a), Florida Statutes (defining the term "gift" as excluding items of value for which equal or greater consideration has been provided within 90 days) and Section 112.3215(1)(d) (defining an "expenditure" to include only those items of value "made by an [executive branch agency] lobbyist or principal for the purpose of lobbying").

[10]The term "business entity" is defined in Section 112.312(5), Florida Statutes, to mean:

> any corporation, partnership, limited partnership, company, limited liability association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

[11]The term "agency" is defined in Section 112.312(2), Florida Statutes, to mean:

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; any public school, community college, or state university; or any special district as defined in s. 189.012.

[12]Please be aware as well that if you accept one or more subscriptions when you know, or, with the exercise of reasonable care, should know, that they are being made to influence a vote or other action in which you are expected to participate as a Trustee, you may be in violation of Section 112.313(4), Florida Statutes (Unauthorized Compensation).

[13]The term "lobbyist" is defined in Section 112.3148(2)(b)1., Florida Statutes, to mean

> any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.

[14]The term "vendor" is defined in Section 112.3148(2)(f), Florida Statutes, to mean "a business entity doing business directly with an agency, such as renting, leasing, or selling any realty, goods or services."

[15]The First District Court of Appeal is currently reviewing Final Order No. 22-041. See Douglas Underhill v. State of Florida, Commission on Ethics, Appeal No. 1D22-3429.

[16]Florida Administrative Code Rule 34-12.180(1) further explains:

> Activities by a lobbyist which do not involve directly attempting to influence a specific decision of an agency in the area of policy or procurement may nonetheless by be considered "lobbying" pursuant to Section 112.3215, F.S., and this rule chapter, where an expenditure is made by a lobbyist or principal for the personal benefit of an agency official or employee. Such expenditures will be considered to have been for the purpose of engendering goodwill, unless the agency official or employee is a relative of the lobbyist or principal paying for the expenditure.