



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST


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MEMORANDUM

TO: H. Jeffrey Cutler Esq., CHAIR
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Judge Lawrence A. Schwartz
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FROM: Jose Arrojo, Executive Director
Commission on Ethics 

SUBJECT: RQO 19-04, Section 2-11.1 (d) of the Ethics Code, Voting Conflicts

DATE: September 05, 2019

CC: All COE Legal Staff

I. Issue

1. Does the voting conflict section of the County Ethics Code impose a *per se* or automatic prohibition on an elected official's vote or participation on a matter if he or she holds a primary enumerated position with an entity that might be directly or indirectly affected by the action of the elected body? ¹

II. Brief Answer

1. The voting conflict section of the County Ethics Code imposes a *per se* or automatic prohibition on an elected official's vote or participation on a matter if he or she holds a primary enumerated position with an entity that might be directly or indirectly affected by the action of the elected body unless:
 - a. the affected entity is another governmental agency; or
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¹ Primary enumerated positions defined as: officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary.

- b. the vote is on an overall county or municipal budget containing a small allocation to the affected entity.

III. Background

An elected official sought guidance from the Ethics Commission regarding the voting and participation conflict section of the County Ethics Code.² As a result of that consultation, the Ethics Commission initiated a preliminary inquiry (PI 19-29) into possible voting conflict violations by other elected officials in that municipality.

Factually, the inquiry revealed that municipality's overall budget for FY 18-19 was approximately 35 million dollars and that two not-for-profits, the local Chamber of Commerce (Chamber) and a local historical and heritage entity (Historical Society) were amongst those that received funding. Two elected officials that held primary enumerated positions with the Chamber of Commerce and the Historical Society voted on the overall budget.

More specifically, one elected official served as a Director of the Chamber of Commerce and that entity received approximately \$77,500 in the municipality's FY 18-19 budget. The official voted on the municipal budget item. The same official was the Secretary of the Historical Society that received approximated \$15,000 in the FY 18-19 budget. Once again, the official voted on the municipal budget item.

A second elected official that served as the President of Historical Society also voted on the municipal budget item.

Prior to the vote on the greater municipal budget, the municipality held a publicly noticed budget workshop. During the workshop, the Mayor questioned the proposed \$15,000 allocation to the Historical Society. The Mayor suggested that the municipality was essentially paying \$15,000 for little more than storage space. In response, the second elected official who served as the President of the Historical Society, participated in the discussion of the proposed allocation.

Because of the consultation with the elected official, the facts revealed by the preliminary inquiry, and the legal staff's consideration of prior Ethics Commission opinions regarding the topic, it is recommended that Ethics Commission provide clear and formal opinion guidance regarding the application of this voting conflict section of the Ethics Code to the above described, or similar, voting and participation scenarios.

² Section 2-11.1 (d) of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance.

IV. Legal Analysis

1. Voting Conflict Provision and “*Per Se* and Automatic Prohibited Conflicts”

Section 2-11.1(d) of the Ethics Code contains the principal voting conflict provision applicable to elected County and municipal officials. In relevant part, that section provides as follows:

Additionally, no person included in the term defined in subsection (b)(1) [county and municipal elected officials] *shall vote on or participate in any way in any matter presented to the Board of County Commissioners if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Board of County Commissioners: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor, if in any instance the transaction or matter would affect the person defined in subsection (b)(1) in a manner distinct from the manner in which it would affect the public generally. Any person included in the term defined in subsection (b)(1) who has any of the above relationships or who would or might, directly or indirectly, profit or be enhanced by the action of the Board of County Commissioners shall absent himself or herself from the Commission meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter. (emphasis added)*³

In an opinion issued in 2011, the Ethics Commission considered whether elected officials have a prohibited voting conflict if they have a primary enumerated relationship with an entity that may be directly or indirectly affected by the action of the council. That case involved council members serving as officers or directors of one or more entities created to manage and renovate a historic property. At least one of the entities was for-profit. The Ethics Commission opined that the elected officials would be precluded from voting on any matters related to the historic property because under the County Ethics Code, if a voting member has a “prohibited relationship” with an

³ Section 2-11.1(a) provides, in relevant part, that references in the section to County personnel shall therefore be applicable to municipal personnel who serve in comparable capacities to the County personnel referred to.” Therefore, the provision applies to elected officials serving on municipal elected bodies.

affected entity, this creates “a *per se* voting conflict independent of whether any personal benefit inured to the elected official.”⁴

In another opinion issued in 2015, the Ethics Commission considered whether a city commissioner that was an “employee” of a store located in a shopping mall could vote on or participate in the discussion of an item concerning the rezoning of the mall. The rezoning would result in a significant increase in the size of the employing store. The Ethics Commission opined that an “automatic prohibited conflict” exists if a voting member has one of the primary enumerated relationships: officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary, with an entity that might directly or indirectly affected by the action of the board.⁵

In a more dated opinion issued in 2003, the Ethics Commission considered whether a candidate for city commissioner, if elected, could vote on or participate in the discussion of item relating to a public utility that employed him. The Ethics Commission opined that no person that has one of the primary enumerated relationships with an entity that might directly or indirectly be affected by an action of elected body can vote on or participate in any way in the matter.⁶

Accordingly, from a plain reading of the subsection and the formal guidance provided by the Ethics Commission in the aforementioned opinions, it is clear that if the voting member holds an primary enumerated position with the affected entity, then there is a *per se* or automatic voting conflict and the member may not vote on or participate in a the matter before the elected body.

⁴ See RQO 11-27 (Miami Springs council members serving as officers or directors of various entities created to manage and renovate the historic Curtiss Mansion, at least one of which would be for-profit, had a *per se* voting conflict on any matter related to the Mansion because they had a prohibited relationship with an entity that would be affected by a vote.)

⁵ See RQO 15-04. (A Bal Harbour commissioner that is an managerial “employee” of the Neiman Marcus located at Bal Harbour Shops may not vote on or participate in the discussion of an item concerning the rezoning of the shopping mall that would result in a significant expansion of the Neiman Marcus store at that location. An “automatic prohibited conflict” exists because of the employee relationship with an entity that will be “affected” by the vote.)

⁶ See RQO 03-145 (Candidate for Homestead city commission that is an “employee” of Florida Power and Light (FPL) may not vote on or participate in the discussion of any matter involving FPL.)

2. "Government Agency Employment Relationship" Exception

The Ethics Commission has created an exception to the bright line *per se* or automatic prohibited conflict rule espoused in the aforementioned opinions for elected officials that have a primary enumerated relationship with "government" affected entity as opposed to a non-governmental entity.

Starting with a formal opinion issued over a decade ago, and a series of informal opinions that have followed, the Ethics Commission has opined that when a voting member is employed with a government entity, then the automatic prohibited conflict rule assessment be followed with a unique interest analysis. In these scenarios, as long as there is no unique impact to the elected official, then he or she may vote and participate on item even though the action of the public body may directly or indirectly affect the government entity.⁸

In a subsequent informal opinion, an elected official serving in an enumerated position as an employee of a governmental entity was advised that she "is not automatically disqualified from participating in an item that would affect the governmental entity" because she would not "personally profit or be enhanced personally in any way in the event that this resolution is passed and the program it promotes becomes a reality." (See INQ 18-68)

3. "Minor Budget Allocation" Exception

In 2014, the Ethics Commission's Executive Director issued an informal opinion that an elected official could vote on an overall budget item, even if the budget provided funding to an entity that employed the elected official, if the funding allocation was very minor compared to the overall budget. It appears that this informal guidance thus created a "minor budget allocation" exception to the elected official voting conflict prohibition contained in the Ethics Code. This informal guidance establishes an exception that may conflict with other *per se* or automatic prohibited voting conflict opinions. (See INQ 14-212)

More specifically, the informal guidance provided that an elected official employed as the Executive Director of a community-based organization (CBO) could vote on an overall budget item, even though the budget provided funding for the employing entity. The official's employer

⁸ See RQO 07-54. (A member of the Board of County Commissioners that is also a School Board "employee" may vote on and participate in the discussion of an item before the Board even when the School Board is the affected entity, as long as the item being considered would not affect the elected official any differently than the general public. Put another way, as long as there is no *unique* impact to the elected official, then she may vote and participate on the item.)

was an entity "which would be or might be directly or indirectly affected by any action" of the elected body inasmuch as it was receiving a funding allocation.

This informal opinion did not rely on prior Ethics Commission formal opinion precedent but rather on persuasive opinions issued by the Florida Commission on Ethics.¹⁰ Also referenced as support was a dated opinion issued by the County Attorney to the particular Commissioner, interpreting State ethics statutes, not the County Ethics Code.¹¹

The informal opinion did advise that the exception applied only to votes on the entire budget when the funding allocation to the affected entity was very minor compared to the overall budget. It also cautioned, that if there were other votes that more narrowly focused on the employing and affected entity, that the Commissioner should not vote as this would be prohibited by the voting conflict prohibitions in the Ethics Code.

For example, if the vote were on items that affected only county funded community-based organizations that included the agency that employed him, then the Commissioner was advised that he should not vote on or participate in that matter. Finally, if the vote was on an item that only affected the employing entity, then clearly the Commissioner could not vote or participate.

¹⁰ See CEO 88-20 (City commissioner employed as the executive director of a nonprofit corporation that sponsored a parade was not prohibited from voting on a city budget containing funding for the parade given the limited amount of funding and the number of matters funded in the city budget); CEO 89-19 (County commissioner was not prohibited from voting on the county budget where the budget contained an allocation of funds to a utility company that employed the commissioner given the number of items addressed in the budget); and CEO 92-43 (City councilman not prohibited from voting on a city budget despite likelihood that the budget would include line item funding for nonprofit corporation that employed the councilman's spouse).

¹¹ The conflict voting prohibition contained in the County Ethics Code is stricter than the state law standard codified in Section 112.3143 (1)(d), Florida Statutes, which provides that "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..." (See INQ 14-86). The County standard does not require a definite or measurable private gain or loss and may apply where there is a reasonable possibility or expectation of such an effect. (See RQO 15-04) Given the enhanced conflict voting prohibition contained in the Ethics Code, circumstances that do not meet the State standard for a voting conflict could still create a voting conflict under the County ordinance in instances where an official might, directly or indirectly, profit or be enhanced by a vote.

4. Ex Officio Directors

In 2013, the Ethics Commission opined that an elected official could vote on and participate in discussion of matters even though she served as a director for the entity that might be directly or indirectly affected by an action of elected body.¹² The Ethics Commission advised the official that the voting conflict section did not apply to her because she served as a non-voting *ex officio* director.

The Ethics Commission has in several instances opined that persons serving in non-voting *ex officio* capacities are not covered parties under the Ethics Code.¹³

That opinion should not be read as creating an exception to the *per se* or automatic prohibited conflict rule but rather simply one that recognizes that a non-voting *ex officio* officer position with a not-for-profit entity is not a primarily enumerated position as defined by the Ethics Code.

V. Conclusion

Section 2-11.1 (d), the voting conflict section of the County Ethics Code, imposes a *per se* or automatic prohibition on an elected official's vote or participation on a matter if he or she holds a primary enumerated position with an entity that may be directly or indirectly affected by the action of the elected body.

¹² See RQO 13-06. (In that case, a County Commissioner was an *ex officio* Director of the Miami Children's Initiative, Inc. (MCI). MCI was a 501 (c)(3) nonprofit entity created pursuant to Board Resolutions for the purpose of managing the collaborative efforts of County, state and private sector agents to provide educational and healthcare services to children and families in the County's Liberty City area. The MCI Bylaws provided that the Commissioner with jurisdiction for Liberty City would be one of seven (7) *ex officio* non-voting Directors.

¹³ The Ethics Commission has opined that persons serving in an "*ex officio* capacity" are not covered parties under the Ethics Code. See RQO 05-66 (Trustee of the Miami-Dade Homeless Trust that served in an *ex officio* capacity because of his or her employment relationship with an enumerated entity was not limited by the Ethics Code's prohibited appearances section from presenting or seeking funding from the Trust, as long as it was done on behalf of the enumerated entity); See RQO 10-25 (Trustee of the Public Health Trust that served in a non-voting *ex officio* capacity because of his or her employment relationship with an enumerated entity did not have to comply with the financial reporting requirements of the Ethics Code that are otherwise applicable to County trust and board members.)

There are two limited exceptions to this bright line rule. First, when a voting member is employed with a government entity, then the automatic prohibited conflict rule assessment be followed with a unique interest analysis. In these scenarios, as long as there is no unique impact to the elected official then he or she may vote on and participate in the consideration of the item that may directly or indirectly affect the employing government entity.

Second, an elected official that serves in a primary enumerated position with an entity, may vote on an overall budget item when the budget provides funding to entity, if the funding allocation is very minor compared to the overall budget.

As regards this second exception, if it is feasible and allowable to separate the line item allocation that funds the affected entity so that the elected official can vote on the overall budget item minus that line item, then this would be the preferred and recommended course of action. If it is not feasible or allowable to carve out the allocation that funds the affected entity so that the elected official can vote on the overall budget item minus that line item, and the allocation is only a very minor portion of the overall budget, then the official may vote on the overall budget item.

Finally, while this exception applies to votes on overall budget votes, the *per se* or automatic voting prohibition nevertheless prohibits an elected official from participating in items or discussion regarding funding of the affected entity in other meetings of the elected body, including participation in budget workshops during which the body is specifically addressing funding for the entity.

This opinion is limited to an interpretation of the County Ethics Code only. It is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission.