



Palm Beach County Commission on Ethics

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September 8, 2011

Mr. Connor Lynch
Plumosa School of the Arts Foundation
2501 Seacrest Blvd.
Delray Beach, FL 33444

Re: RQO 11-075
Charitable Solicitation

Dear Mr. Lynch,

Your request for an expedited advisory opinion pursuant to Commission on Ethics rule of procedure 2.6 has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your e-mail of August 31, 2011 and follow-up e-mails of September 1, 2 and 6, 2011 whether municipal elected officials and employees may participate in a fundraising event for the Plumosa School of the Arts Foundation (PSAF). You also asked if a conflict of interest exists for public employees who are officers or directors of the foundation.

IN SUM, the Code of Ethics does not prohibit elected officials or employees from participating in charitable fundraising events, provided that any solicitation or acceptance of donations in excess of \$100 from a person they know, or should know with the exercise of reasonable care, is a vendor, lobbyist, principal or employer of a lobbyist who sells, leases or lobbies their municipal government, is transparently recorded in accordance with the charitable solicitation requirements of the code.

Public officials or employees who are officers or directors of a non-profit organization may not use their official public position or title, directly or indirectly, to specially financially benefit that organization.

THE FACTS as we understand them are as follows:

The Plumosa School for the Arts Foundation (PSAF) plans to host a "Mayor's Throwdown" (the Event) to be held at Bru's Room Sports Grill in Delray Beach on September 21, 2011. The Event is open to the public. The foundation has invited three municipal mayors (Boca Raton, Delray Beach and Boynton Beach) to act as "celebrity bartenders." The mayors will pour drinks and help pass them out but will not engage in any direct solicitation. All tips go towards PSAF and are placed in one of three tip jars, identified by municipality. The premise of the Event includes a "competition" between mayors as to which municipality raises the most in tips. You plan to have a volunteer stationed at each tip jar in order to log any donations in excess of \$100. The donor will be asked if he or she is a vendor or lobbyist of the municipality but in an abundance of caution, all such donations will be recorded. In addition, the tip jars will not be visible to the mayors during the course of the event. Lastly, to ensure compliance with the code, organizers will announce, in print and orally during the Event, that vendors and lobbyists must identify any cash donation in excess of \$100 to the monitor so that they may be recorded on the log. You have indicated your desire to take these precautionary steps to avoid any inadvertent or unintentional violation of the reporting requirements as well as the appearance that such an unlogged prohibited gift could otherwise be easily made in a cash/tip scenario.

PSAF has had an ongoing campaign to sell name plates on the seats in the auditorium of the school and to sell engraved bricks at the entrance to the auditorium. You plan to continue to solicit these donations at the Event. Bricks sell for \$150, and seats sell for \$500 or \$1000. In order for attendees of the Event to purchase a brick or a chair, they will be required to complete a form that contains a checkbox for vendors and lobbyists of the municipalities involved in the fundraiser. As a cautionary measure, all such donations made at the event will be logged and submitted in accordance with the requirements of the Code of Ethics. No municipal resources will be used at the Event and no vendor with a pending application before any participating municipality will be permitted to donate in excess of \$100.

Two municipal employees serve on the PSAF board or appear on PSAF letterhead. In all instances, they are listed as private citizens and not in their capacity as a public official. None of the "celebrity bartenders" are associated with PSAF. At the Event, you will be speaking as the Chair of PSAF, asking the guests to donate, and will thank the Mayors for volunteering their time.

You have requested an expedited response from the COE.¹

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Code of Ethics, which took effect on June 1, 2011:

Section 2-444. Gift Law

- (a) No county commissioner, member of a local governing body, mayor or chief executive when not a member of the governing body, or employee or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than One Hundred Dollars (\$100) from any person or business entity that the recipient knows is a lobbyist or any principal or employer of a lobbyist who lobbies, sells or leases to the county or municipality as applicable.
- (e) No person or entity shall offer, give, or agree to give an official or employee a gift, and no official or employee shall accept or agree to accept a gift from a person or entity, because of:
 - (1) An official public action taken or to be taken, or which could be taken;
 - (2) A legal duty performed or to be performed or which could be performed; or
 - (3) A legal duty violated or to be violated, or which could be violated by any official or employee.

Section 2-443. Prohibited Conduct

- (a) Misuse of Public Office or Employment. An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner in which he or she knows or should know with the exercise of reasonable care, will result in a financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
 - (7) A nongovernmental group, union, social, charitable, or religious organization of which he or she is an officer or director.

Under the gift law provisions, §2-444(a) prohibits a public employee from soliciting or accepting a gift worth more than \$100 from a vendor or lobbyist in most circumstances. The revised Code of Ethics provides an exception to this prohibition to allow participation by officials and employees in charitable

¹ Rule of Procedure 2.6 Expedited Responses. When the requesting party so indicates, and the facts support an expedited review of a request for advisory opinion, the Executive Director will confer with the COE Chairperson or Co-Chairperson to determine whether; to set the matter for review at the next scheduled meeting; to set a special meeting of the COE to review the request; or to have the Executive Director respond prior to the next regular meeting.

fundraising.² However, this exception does require that fundraisers maintain and submit a log of all solicitations or donations in excess of \$100 from vendors or lobbyists doing business or lobbying their public employer. It should be noted that by including solicitation of charitable donations *by any other person or business entity on his or her behalf* the code encompasses the indirect solicitation made by others involved in a charitable fundraiser. The recording of these gifts may therefore be delegated to a third party who actually solicits or accepts the donation.³ Alternatively, as in this instance, scrutiny and notation of any donations subject to the logging requirement would be handled by announcements and monitors put in place by the non-profit organization. Where the organization has reasonable protocols in place to capture and log otherwise prohibited gifts, an employee or official may act reasonably in reliance on these protocols.

Furthermore, in soliciting donations from vendors or lobbyists, a public employee or official *may not use county or municipal staff or other county or municipal resources in the solicitation of charitable contributions.*⁴ It should be noted that notwithstanding any other provision, a public employee or official may not accept anything of value as a *quid pro quo* in exchange for an official act or the past, present or future performance of a legal duty.

Section 2-443(a), misuse of office, prohibits a public official or employee from specially financially benefiting a non-profit organization *of which he or she (or his or her spouse or domestic partner) is an officer or director.* Therefore, any municipal employee who is an officer or director of PSAF, may not use his or her position to financially benefit the organization, *in a manner which he or she knows or should know will result in a special financial benefit, not shared with similarly situated members of the general public,* which in this instance would be all other similarly situated charitable organizations. Here, while two employees serve on the board of directors of PSAF, they do so as private citizens and not in their official capacity or title.⁵

THE RATIONALE for allowing public officials and employees to accept or solicit otherwise prohibited charitable donations made by vendors or lobbyists of their respective municipal governments may be found in §2-244(h) of the revised Code of Ethics. As previously stated, as long as no public resources are used and vendors with pending applications are excluded, these gifts are now permitted provided they are recorded for purposes of transparency. Therefore, gifts from vendors and lobbyists in excess of \$100 solicited or accepted by an official, directly, indirectly, or on his or her behalf, are permissible provided a log is kept and transmitted to the COE as required.

Compliance can be easily monitored when donations are attributed to a person or entity, as with a written pledge or check. In regard to cash donations, when facts and circumstances indicate donations are mostly random, anonymous and in small amounts, the need for transparency may be lessened insofar as public perception is concerned. Recently, the COE opined that Palm Beach County Fire Rescue personnel were not prohibited from participating in the annual MDA Fill the Boot Drive, provided that any donation offered in excess of \$100 is identified as to the donor.⁶ In this way, the donor's name could later be cross referenced with the appropriate vendor or lobbyist list and recorded if necessary.

While the facts and circumstances surrounding the proposed "Bartender Throwdown" may be distinguishable from the MDA event, the requirements of the code remain the same. Unlike the MDA

² Section 2-444(h), PBC Code of Ethics

³ RQO 11-029, RQO 11-041 (solicitations by third parties on behalf of public officials must comply with logging requirements of the code)

⁴ Section 2-444(h)(3), PBC Code of Ethics

⁵ RQO 11-029 (an employee or elected official who serves as an officer or director of a charitable organization may not use their official title or elected office in soliciting donations; to do so would per se constitute using their employment or elected office to specially financially benefit that charity)

⁶ RQO 11-065 (participation in the MDA Boot Drive Fundraiser, where donations are generally anonymous, spontaneous and given in small amounts, by on duty municipal personnel standing on street corners and medians was not prohibited so long as the requirements of §2-444(h) were followed)

fundraiser, the participants in the PSAF event are not random motorists. In addition, the persons soliciting donations are mayors of three municipalities and, therefore, high-ranking officials. The premise of the PSAF event is based upon competition between elected officials and "bragging rights" over which one can garner the most tips. These are meaningful differences in that there may be a public perception that vendors and lobbyists will contribute in part to obtain the good will of the officials with whom they do business. However, so long as there is no *quid pro quo* or other benefit given in exchange, the motive of the donor is not at issue provided the donation is transparent and properly recorded.⁷

The MDA fundraiser rationale applies equally to the PSAF Event so long as the requirements of the code are met. Because the donations will be cash and the facts and circumstances are distinguishable from MDA, you have indicated that PSAF volunteers will take additional steps to ensure that any cash donations in excess of \$100 from vendors or lobbyists of the respective municipalities will be properly recorded and submitted as required by the code.⁸ To ensure anonymity, the tip jars will be hidden from the celebrity bartenders.⁹ In addition, PSAF will post monitors to ensure that otherwise prohibited gifts may be identified and recorded pursuant to the code requirements. Similarly, the PSAF brick/seat purchase form includes a checkbox for lobbyists and vendors of the three municipalities represented in order to identify their status. To ensure transparency, you have indicated that all such purchases will be recorded and submitted within 30 days of the event to the Commission on Ethics.

Lastly, you intend to publicly announce limitations and transparency requirements in order to ensure prospective donors comply with the code. These combined extra layers of scrutiny will serve to eliminate inadvertent violations by vendors, lessen any perception of impropriety and avoid accusations that a public official knew or should have known a prohibited cash gift was given on their behalf.

IN SUM, Based on the facts you have submitted, the direct or indirect solicitation or acceptance by the various mayors of otherwise prohibited gifts in excess of \$100 from vendors and lobbyists is not prohibited, so long as the gift is transparent, not obtained by the use of public resources and is not from vendors with a pending application before their municipality. A log of these gifts must be transmitted to the COE within 30 days of the event. In addition, a gift of any value may not be given in exchange for the past, present or future performance of an official act or legal duty. The PSOA event is not prohibited and gifts in excess of \$100 from vendors and lobbyists of the participating municipal officials are permitted as regulated.

Officers or board members of PSAF who are public employees may not use their official title or position to specially benefit PSAF.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

⁷ Section 2-442, PBC Code of Ethics defines lobbying as "an attempt to obtain the goodwill of any county commissioner, any member of a local municipal governing body, any mayor..." Such an act does not, by itself, constitute a violation of the code.

⁸ Section 2-444(a)(2), PBC Code of Ethics (prohibiting a vendor, lobbyist, principal or employer of a lobbyist from giving a gift in excess of \$100 to a person they know is an official or employee of a municipality of which they sell, lease or lobby)

⁹ Section 2-444(a) requires that the official "knows or should know with the exercise of reasonable care" that the prohibited gift is from a vendor, lobbyist or principal or employer of a lobbyist. Therefore, a truly anonymous gift does not violate the code.