



Palm Beach County Commission on Ethics

Commissioners

Edward Rodgers, *Chair*
Manuel Farach, *Vice Chair*
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

Executive Director

Alan S. Johnson

December 1, 2011

Shelley Vana, County Commissioner
Palm Beach County Board of County Commissioners
310 North Olive Avenue, Suite 1201
West Palm Beach, FL 33401

Re: RQO 11-101
Financial Benefit/Outside Employer of Relative

Dear Commissioner Vana,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on November 30, 2011.

YOU ASKED in your letter of 11/07/2011 whether the Code of Ethics applies to issues that may come before the Commission involving customers or clients of your son's firm, and further, what "reasonable care" and "special financial benefit" mean within the context of your public duty under the code.

IN SUM, the code of ethics misuse of office provisions involving special financial benefit do not apply directly to customers or clients of your son's firm. However, if a scenario is presented to the BCC whereby your son's firm itself will receive a financial benefit, not shared with similarly situated members of the general public, you may not vote or participate in the matter. There is no bright line definition of *reasonable care* or *special financial benefit*. Reasonableness necessarily depends on the facts and circumstances presented. However, in the absence of apparent or direct knowledge on your part indicating a special financial benefit to your son or his firm, a violation is unlikely.

Determining what constitutes a *special financial benefit, not shared by similarly situated members of the general public*, depends upon the size of the class affected by the public vote or action, and whether the benefit is shared equally among that class of persons or entities.

THE FACTS as we understand them are as follows:

You are a sitting Palm Beach County Commissioner. Your son works for a technical services firm that provides staffing for corporations in need of various computer-related operations. He is one of several employees who recruit potential clients for the company and is paid based on salary and commission received for the clients he successfully recruits.

Your son's company does not do business with Palm Beach County, but it is possible from time to time that the clients of his company will. While your son is not an equity owner or officer of his firm, he may be invited into an eventual equity ownership position or partnership in the future.

As a County Commissioner, you are concerned about your ability to monitor the client list of your son's company in order to determine whether a client has business before the Board of County Commissioners (BCC). The company has numerous clients and the BCC votes on well over one hundred matters each month. While you intend to

abstain and not participate in any matter involving a possible conflict of which you are aware, you are concerned about the standard of care required by the code in determining whether or not a conflict may potentially exist.

THE LEGAL BASIS for this opinion may be found in the following relevant provisions of the Code of Ethics:

Sec. 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 which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities: (relevant entities listed below)

- (1) Himself or herself;
- (3) A sibling or step-sibling, child or step-child, parent or step-parent, niece or nephew, uncle or aunt, or grandparent or grandchild of either himself or herself, or of his or her spouse or domestic partner, or the employer or business of any of these people;
- (5) A customer or client of the official or employee's outside employer or business;

Section 2-443(c) Disclosure of voting conflicts, requires a public official to abstain and not participate in any matter coming before his or her board or commission which would result in a *special financial benefit* to the persons or entities listed in the misuse of office section.

Section 2-443(b) Corrupt misuse of official position, prohibits an official from *corruptly* using his or her office to obtain any benefit for any person or entity. *Corruptly*, means done with a wrongful intent, inconsistent with the proper performance of an official's public duties.

You asked about your public duty as it pertains to customers or clients of your son's company. Sections 2-443(a)(5) and (c) only pertain to customers or clients of *your* outside employer or business. It does not extend to customers or clients of employers or businesses of relatives. That being said, if an issue comes before the BCC that would financially benefit your son's employer, as listed in §2-443(a)(3) and (c), in a manner not shared by other similarly situated individuals or entities, the code requires that you abstain and not participate in the issue, *if you know, or reasonably should know of the conflict*. The status of customer or client to your son's firm alone would not trigger such a conflict, however, if your son's business is involved in the matter directly, or a financial benefit for your son's firm is contingent upon your official action or the passage of legislation, then the misuse sections may apply if you know of the conflict, or should know with the exercise of reasonable care. These sections apply where the financial benefit is to your son, or his firm, not his customer or client. This is true whether your son is an employee or part owner of the firm.

Additionally, you asked for assistance in defining your obligation to exercise reasonable care pertaining to potential conflicts. Regarding the standard of care required by the code, there is no bright line definition of *reasonable care*. The State Code of Ethics contains similar language regarding unauthorized compensation.¹ In the context of receiving gifts, Florida Appellate Courts have upheld the constitutionality of this section of the state ethics code.²

The COE must find by clear and convincing evidence that a public official or employee committed a violation, *based upon competent substantial evidence in the record*.³ In a case involving the receipt of a gift as a quid pro quo, the

¹ §112.313(4) Unauthorized compensation. 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...*

² *Commission on Ethics v. Barker*, 677 So2d 254 (Fla. 1996), *Goin v. Commission on Ethics*, 658 So2d 1131 (1st DCA 1995)

³ §2-260.1(g)

Florida Supreme Court analogized the knowledge component of the state *unauthorized compensation* statute⁴ to criminal theft statutes that similarly hold a person accountable for trafficking in property that *he knows or should know was stolen*.⁵ While constructive knowledge may be proven by circumstances, the act by itself (i.e., accepting a gift) would not be sufficient to prove the offense. Therefore, In regard to your son's business relationships, a financial conflict violation may only be sustained if you had actual or constructive knowledge of the conflict. Facts and circumstances must be relied upon to determine the presence or absence of that knowledge.

Lastly, you asked for clarification as to the definition of *special financial benefit*. Violation of the misuse of office and voting conflict sections turns on whether or not a financial benefit is shared with similarly situated members of the general public. This issue was discussed in a previous advisory opinion involving the Aviation and Airports Advisory Board's consideration of an airport fuel surcharge.⁶ In the context of your question, a special financial benefit is a benefit that would inure to your son or his company, by virtue of your official action, influence or vote, not shared with similarly situated businesses or members of the general public.

IN SUMMARY, the financial misuse of office and voting conflicts sections of the code dealing with customers or clients apply only to the outside employer or business of the official or employee, and do not extend to employers or businesses of his or her child. However, if an official's action results in a financial benefit to the employer or business of their child, that is not shared with similarly situated businesses or members of the general public, and that fact is known, or *with the exercise of reasonable care*, should be known to the official, such an action would violate the code.

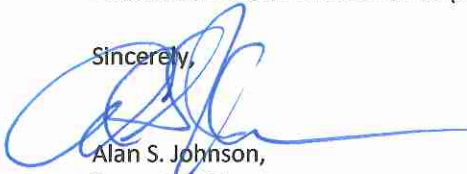
There is no bright line definition of reasonable care. Nor is there a requirement that a particular level of scrutiny be undertaken by public officials regarding the business interests of relatives and household members. A determination of whether or not an official or employee knows or should know of a conflict of interest can only be made on a case by case basis, based on the facts and circumstances presented. Circumstantial evidence of knowledge is relevant; however, a violation may ultimately be sustained only by clear and convincing evidence that there was actual or constructive knowledge of the financial conflict.

Lastly, the term *special financial benefit, not shared with similarly situated members of the general public* refers to those who stand to gain or lose financially from a public decision.

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

⁴ §112.313(4) ("No public officer...shall, at any time, accept any...thing of value when such public officer...knows, or, *with the exercise of reasonable care, should know*, that it was given to influence a vote or other action...")

⁵ *Commission on Ethics v Barker*, supra. (While constructive knowledge may be sufficient to pass constitutional muster, the court indicated "At the same time, however, we note that proof that something of value was given to a public official who might be in a position to help the donor one day, without more, would not establish a violation of §112.313(4)")

⁶ RQO 10-013 (airport users are considered "similarly situated members of the general public" for purposes of determining whether a voting conflict exists regarding a fuel flowage surcharge affecting only general aviation airport users, provided that the individual board member's benefit or loss does not significantly exceed other members of the affected class.)