



Palm Beach County Commission on Ethics

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February 3, 2012

Carlos Cabrera, Fire Chief
City of West Palm Beach
401 Clematis Street
West Palm Beach, FL 33401

Re: RQO 12-001
Contractual Relationships/Misuse of Office

Dear Chief Cabrera,

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 February 2, 2012.

YOU ASKED in your letter of January 9, 2012 whether a company you own may continue to provide software support and receive compensation from the City of West Palm Beach (the City) for EMS software, previously provided to the City by your company, until a new County system is operational.

IN SUM, as of June 1, 2011, the Code of Ethics prohibits you or your outside business from entering into a contract with your public employer unless one of several exceptions applies.

Based upon the facts you have submitted, your outside business is not prohibited from fulfilling the terms of its licensing agreement with the City entered into prior to the effective date of the code of ethics. However, all agreements revised or renewed after June 1, 2011 are subject to the contractual relationships prohibitions of the Code of Ethics. An exception to this prohibition exists where your company is the only source of supply within the City, provided there is full disclosure of your interest in the outside company to the City and the Commission on Ethics.

Lastly, notwithstanding your ability to enter into such a contract as a sole source provider, you may not use your official position to give or influence others to give your business a special financial benefit.

THE FACTS as we understand them are as follows:

You are the Fire Chief of the City of West Palm Beach (the City). In 1997, the City Fire Rescue Department established a committee to evaluate software for tracking Emergency Medical Services reports (EMS). The committee evaluated a number of products and recommended that the department purchase the "EMSexpress" system created by Code 3 Software (Code 3).

You are an owner of Code 3, a software company based in West Palm Beach. The City entered into a licensing agreement with Code 3 for use of the EMS software in 1998 and Code 3 has provided software

support and maintenance since that time. The software licensing agreement between Code 3 and the City was renewed most recently in 2006. Pursuant to the licensing contract, service and support of the EMS software was provided at no additional cost for thirty days. After that initial period, Code 3 agreed to provide software support on a yearly basis for an additional fee. The City may terminate or amend the support agreement on the anniversary of the contract date. The City did not terminate its agreement for software support with Code 3, and the support contract automatically went into effect after June 1, 2011. Code 3 has continued to provide software support to the City but based upon your position as Fire Chief, the company has not as of yet billed the City for the service since June 1.

The Fire Department is planning to change software in mid to late 2012. Palm Beach County Fire Rescue has developed EMS software and has offered it to the City. By using the new County software, the city hopes to address operational issues that have arisen since the County started dispatching for the City in 2007. Code 3 will not be involved in the operation or maintenance of the County software.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

Action under the code of ethics is prospective, that is, a violation may not be sustained for events occurring prior to the effective date of the code.¹ This is true when the code affects substantive rights and liabilities, such as the underlying software contract between the City and Code 3.² Simply put, a person is not held responsible for conduct that was not prohibited at the time. Section 2-443(d) prohibits employees or their outside employer or business from entering into contracts or other transactions for goods or services with the government they serve, unless one of several exceptions apply. The software licensing agreement between the City and Code 3 was entered into in 1998 and renewed in 2006, prior to the enactment of the revised Code of Ethics on June 1, 2011. Therefore, the software licensing agreement is not subject to the contractual relationship prohibitions of the code.

However, the licensing contract between Code 3 and the City provides that on each anniversary of the contract execution date, the City may elect to terminate its service agreement with Code 3. We are of the opinion that any renewal or change in the terms of an existing contract after the effective date of the Code subjects the parties to the revised Code of Ethics provisions. Unless an exception applies, Code 3 is prohibited from contracting to provide ongoing software maintenance to the City. However, based on the information you provided, Code 3 is the sole supplier of maintenance within the City for the EMS software.³

Section 2-443(d)3 provides the following exception.

- (3) The outside employer or business involved is the only source of supply within the county or municipality as applicable and there is full disclosure by the official or employee of his or her interest in the outside employer or business to the county or municipality as applicable and the ethics commission prior to the purchase, rental, sale, leasing or other business being transacted.

¹ Art. V, Division 8, §2-260.6, *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1499 (1994) (A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law).

² *Arrow Air, Inc. v. Walsh*, 645 So.2d 422 (Fla. 1994)(Whistleblower statute cannot be applied retroactively, since it created a new cause of action and affected substantive rights and liabilities)

³ The software itself has already been delivered and installed. The ongoing renewals are for maintenance only.

Code 3 is the exclusive provider of technical support for the EMS express system and is the only source of supply within the City. For Code 3 to continue to provide support for its software, you must disclose your interest in the company to the City of West Palm Beach and to the Palm Beach County Commission on Ethics. Based upon the information you provided, you have already disclosed the nature of your interest in the company to the City and this request for advisory opinion shall serve as your disclosure to the Commission.

In addition, §2-443(a) *misuse of public office or employment* prohibits employees and officials from using their official position to obtain a special financial benefit for themselves or their outside employer or business.⁴ Any attempt to use your official position as Fire Chief to influence the City or your department on behalf of Code 3, for a financial benefit not shared by similarly situated members of the general public, would violate the misuse of office section of the code. To be clear, a financial benefit is defined as anything of value.⁵

IN SUMMARY, public employees are prohibited from entering into contracts or other transactions with their public employer unless one of several exceptions applies. Based on the facts you have submitted, your outside business, Code 3 is the sole source provider of software support and maintenance for its EMSexpress software. Accordingly, Code 3 is not prohibited from entering into a contract with the City to provide such service provided there is full disclosure of your interest in the business in accordance with §2-443(d)3. Notwithstanding this exception to the contractual relationship prohibition, you have an ongoing responsibility to avoid using your official position to specially financially benefit your outside business, as to do so would constitute a misuse of your official position.

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/mcr/gal

⁴ §2-443(a)1; §2-443(a)4; *Compare* RQO 11-037 (where a private resident inspector is a sibling of the town building inspector, the best practice would be to assign oversight responsibility to another town employee or official)

⁵ §2-442