

subdivision of the state shall hold office as a member of the governing board, council, commission, or authority, by whatever name known, which is his or her employer while, at the same time, continuing as an employee of such employer.

(b) The provisions of this subsection shall not apply to any person holding office in violation of such provisions on the effective date of this act. However, such a person shall surrender his or her conflicting employment prior to seeking reelection or accepting reappointment to office. [Section 112.313(10), 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.]

Under our precedent, we find that the existing situation is conflicting under both statutes. See CEO 89-56, CEO 80-29, CEO 78-28, CEO 76-187, and CEO 76-109 (especially CEO 78-28, where the money compensation was \$5 per fire call), reasoning that employment's necessary element of compensation was present.

However, if the monetary payments to firefighters are eliminated or if a true reimbursement-for-actual-expenses policy is substituted for the \$2 per run payment, we find that the element of employment would fail due to there being no compensation,^[2] and thus that the resulting situation will not be conflicting.^[3] Also, if a per-run payment remains in place, if you refuse in writing in advance to accept it and in fact do not accept it, we find that the resulting situation will not be conflicting.

Accordingly, we find that your situation containing the payment of the \$2 per run fee is violative of the statutes, that elimination of the fee or conversion to a true reimbursement procedure will negate the conflict, and that your personal refusal in writing coupled with your lack of acceptance of the per run fee also will negate the conflict.

ORDERED by the State of Florida Commission on Ethics meeting in public session on November 17, 2000 and **RENDERED** this 21st day of November, 2000.

Howard Marks
Chair

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- [1] Located in Okaloosa County in or near Niceville.
- [2] Under our precedent, the workers' compensation coverage, life insurance, firefighting equipment, and any true reimbursement provided to District firefighters would not constitute compensation. See CEO 89-56 and CEO 93-23.
- [3] Also, we find that any District Commission measures to eliminate the \$2 payment would inure to your special private gain or loss (your being one of a small number of affected firefighters), necessitating you abstention from voting and further compliance with the voting conflicts law [Section 112.3143(3)(a), Florida Statutes]; see CE Form 8B.

CEO 93-23 -- July 15, 1993

CONFLICT OF INTEREST

SCHOOL DISTRICT EMPLOYEE MAKING PRESENTATIONS FOR CORPORATION CONTRACTING WITH DISTRICT

To: *Joanne H. Urrutia, Educational Specialist, Dade County Public Schools (Miami)*

SUMMARY:

A prohibited conflict of interest exists under Section 112.313(7)(a), Florida Statutes, where a public school district employee works privately for a corporation which is a party to a contract with the district. The employee would hold an employment or a contractual relationship with a business entity subject to the regulation of, or doing business with, her agency and, under the circumstances presented, the relationship would create a continuing or frequently recurring conflict or impediment to duty. Section 112.313(7)(a) would not be violated where the employee provides services for the corporation free of charge and the corporation pays the employee's costs of travel. However, the travel could constitute "unlawful compensation" given to influence the employee's official actions in violation of Section 112.313(4), Florida Statutes, unless the employee's public agency approves the travel, the employee seeks travel reimbursement from her agency, and the agency seeks reimbursement from the corporation. CEO's 92-28, 92-12, 91-65, 91-58, 91-29, 88-24, 85-74, 82-39, and 81-40 are referenced.

QUESTION 1:

Does a prohibited conflict of interest exist where you, a Dade County public school teacher on special assignment working in the School District's Computer Education and Technology Office, make compensated presentations for a corporation contracting with the District?

Your question is answered in the affirmative.

By your letter of inquiry and telephone conversation between you and our staff, we are advised that you have been an employee of Dade County Public Schools (DCPS) since 1975, serving the last nine years as a teacher on special assignment working in the Computer Education and Technology Office. You advise further that you are currently a District-level employee not assigned to any one school of the Dade County School District, that you have never been required to file financial disclosure pursuant to State statute, and that you are not considered a procurement employee.

In addition, you advise that, pursuant to a request for proposals (RFP) put forth by the School Board under which a vendor would be selected to handle "the technical end of the project" and under which the Board would "supply the curriculum guidelines," a corporation entered into an agreement called a "co-development project" for the development of

instructional materials for Technology-Assisted Language Learning for K-12 ESOL Students (Project TALL). Under the agreement, you advise, the corporation holds the copyright resulting from the project, but royalties are received by DCPS and the State Department of Education (DOE). You relate that when the project is finished, all public schools in Florida will be able to purchase the instructional materials at cost, that a third of the product is finished and has been released for sales, that a second portion will be released sometime this summer, and that a final release is scheduled for late fall.

You advise that you were selected to manage the project for DCPS in your public capacity, that you convened a team of educators with expertise in the field of ESOL instruction to provide input for the preparation of the RFP, that you compiled the team's recommendations, and that you had a major part in the writing of the RFP, which you sent to about five hundred companies. You advise further that you convened another group of expert educators from around the nation, "provided them with an evaluation sheet," and coordinated the group's meetings, but that you did not participate in the evaluation and selection process that chose the corporation. In addition, you advise that once the corporation was selected, you had a major part in the contract negotiations.

As project manager, you advise, your duties include organizing both the local and national advisory panels of curriculum experts; coordinating meetings of these panels to review and approve prototypes and deliverables; coordinating field tests of the materials; coordinating communication between DCPS, DOE, and the corporation; processing payments to the Corporation when milestones have been reached; and, in general, monitoring the day-to-day progress of the project. You relate that you have been involved in every phase of this project, which is one of the first and largest of its type in the Country.

The corporation, you advise, is requesting that you travel around the Country to share your experiences with other educators and to provide information on the scope of the project and the curriculum guidelines that were followed regarding the project. You relate that your message as you travel will be that the State has invested in the project for the benefit of its large immigrant student population, but that it should be able to benefit students in other parts of the Country as well. Further, you advise that you think it is in both DCPS's and DOE's interests that the product sell well outside of Florida so that they can receive royalties, and you contend that due to the nature of the relationship between DOE, DCPS, and the corporation, the Code of Ethics may not be applicable or that an exception could be made "in this case." You advise that the corporation would pay your travel expenses and would pay you a fee for your services, that you would be doing this on your own time, and that when you are presented to an audience it will be known that you have been the project manager and work for DCPS. You advise that you already have made one such presentation for the corporation and have been scheduled to make several others.

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.]

The first clause of this provision would prohibit you from holding any employment or contractual relationship with any business entity which is subject to the regulation of, or which is doing business with, your public agency. The second clause would prohibit your holding an employment or a contractual relationship that will 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.

It is apparent that the corporation is doing business with the School Board by virtue of the co-development project agreement entered into between the corporation and the Board pursuant to the RFP, and the corporation also may very well be subject to the regulation of the Board due to the terms and conditions of the agreement, including the Board's "supplying the curriculum guidelines." Therefore, we find that a prohibited conflict of interest would be created under the first clause of Section 112.313(7)(a) were you to have an employment or a contractual relationship with the corporation. See, for example, CEO 88-24.

For the second clause of Section 112.313(7)(a) to be violated, it is not necessary that a public employee actually misuse his public position, and this opinion does not make such a finding of misuse regarding your conduct. The existence of temptation for a public officer or employee to forsake the objective performance of his or her public duty in favor of his or her own private interests is sufficient to constitute a violation of the second clause, and the existence of such a temptation is to be discerned from an examination of the nature and extent of the public employee'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. See Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

Clearly, in a situation in which a public employee has no public duties or responsibilities in relation to his private employer, he could not be tempted to compromise his public duty performance for the benefit of the private employer. However, your situation is one in which you do have public duties relating to the corporation (your private employer) which you could be tempted to compromise, including processing payments to the corporation when milestones in the project have been reached and monitoring the day-to-day progress of the project. In scrutinizing the corporation and its performance under the agreement, in making payments to the corporation, in deciding to alert other public officials or personnel to the corporation's performance or lack thereof under the agreement, or in related functions or matters, proper performance of public duty demands that you be unfettered by private affiliations with that very same corporation which impact your income and personal economic concerns. We have made similar findings of, or discussed, frequently recurring conflicts or impediment to duty under the second clause of Section 112.313(7)(a) in many previous opinions, including CEO 82-39 (Department of Education auditor teaching a course for a school district whose programs are audited by her), CEO 91-58 (school principal consultant to company selling textbooks to schools), CEO 91-65 (school psychologists engaging in private practice), and CEO 92-28 (school director and teacher receiving royalties from sale of textbooks required for their courses).

Section 112.313(12), Florida Statutes, provides exemptions from the conflicts under Section 112.313(7)(a) discussed above for situations in which the business between the private entity and the public agency is awarded under a system of sealed, competitive bidding, or in

which the business entity involved is the only source of supply within the political subdivision of the public employee. However, neither of these exemptions would appear to be applicable under your scenario.

Accordingly, we find that a prohibited conflict of interest exists where you make compensated presentations for the corporation.

QUESTION 2:

Would a prohibited conflict of interest be created were you to make the presentations under an arrangement in which the corporation paid your travel expenses but paid you no fee for your services?

You advise further that the same presentations could take place under an arrangement under which you would be paid no fee for your services. However, the corporation would send you airline tickets, book your lodging in advance at its expense, and reimburse you for carfare and similar expenses which could not be paid directly by the corporation in advance.

Generally, in our previous opinions, we have found that the existence of an employment or a contractual relationship for purposes of Section 112.313(7)(a) is dependent upon the payment of salary or other compensation to the person performing services for the private entity. See, for example, CEO 81-40, CEO 85-74, CEO 91-29, and CEO 91-58. It is apparent to us that the Legislature, in enacting Section 112.313(7)(a), chose the terms "employment" and "contractual relationship" to trigger the prohibitions of that section because those terms generally describe situations that involve the payment of money or other concrete compensation for services rendered, increasing the income or wealth of the recipient as opposed to merely reimbursing the person for expenses, and that therefore such situations have the potential to influence the behavior of public officials, unlike situations in which one provides services only for intangible rewards. Thus, we do not find the understanding between you and the corporation whereby you would make presentations for the corporation and the corporation would reimburse you for travel and related expenses to constitute a "contractual relationship" for purposes of Section 112.313(7)(a), even though it could be considered "contractual" in that you likely would have a cause of action against the corporation for lack of reimbursement under legal theories involving mutual promises as substitutes for consideration, promissory estoppel, estoppel in pais, quantum meruit/unjust enrichment, contracts implied in fact, or contracts implied in law, etc. Thus, regarding a violation of Section 112.313(7)(a), this question is answered in the negative.

In addition, we do not find that the reimbursement for travel and related expenses would be prohibited or reportable under the "gift law" contained in Section 112.3148, Florida Statutes, or under the law relating to honoraria or expenses related to an honorarium event, because you do not appear to be a "reporting individual" or a "procurement employee" (the two classes of public officers or employees to which the gift law is applicable).

Nevertheless, depending on a degree of factual specificity and circumstantial certainty not present in the context of an advisory opinion, the travel/reimbursement could constitute "unauthorized compensation" violative of Section 112.313(4), Florida Statutes. That section provides:

UNAUTHORIZED COMPENSATION.--No public officer or employee of an agency or his spouse or minor child shall, at any time, accept any compensation, payment, or thing

of value when such public officer or employee 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 or employee was expected to participate in his official capacity. [Section 112.313(4), Florida Statutes.]

While the travel/reimbursement might not constitute "compensation," for purposes of Sections 112.313(7)(a) or 112.313(4), it is a "payment" or "thing of value" under Section 112.313(4). See *In re WINSTON W. "BUD" GARDNER*, Complaint No. 90-216, where a former State Representative was found to have violated Section 112.313(4) by accepting a fishing trip to the Florida Keys from legislative lobbyists. In addition, the corporation is an entity which could benefit from your official actions, given your involvement with its agreement with the School Board, its performance under the agreement, and related matters. Further, the more that the travel/reimbursement is in an amount or form that is reasonably related to necessary and actual presentations by you and necessary and actual amounts and expenses for such travel, the more likely the same would not be given to influence your official actions, as opposed to a situation in which, for example, a business entity sends a public official to a plush resort for two weeks in order for the official to deliver a twenty-minute presentation that is unnecessary to the promotion of the entity's product.

However, where your public agency determines that such a trip/presentation by you is in the interest of the agency and approves your travel, you could make the trip, deliver the presentation, and, upon your return, apply for reimbursement for per diem and/or other travel expenses, pursuant to Section 112.061, Florida Statutes, as you would for any other travel related to your public position, with the corporation reimbursing your public agency for the travel expenses. Such a situation, because it would include the public agency's approval of the trip/presentation and because it would obviate the need of a transfer of something of value directly to you from the corporation, would effectively negate the danger that the trips were for the purpose of influencing you on behalf of the corporation. Compare CEO 92-12 (Question 1) in which we advised that the Public Service Commission, and not its employee, receives a gift where the employee travels at public expense to perform an audit on a utility company's records and the utility company reimburses the PSC for the employee's expenses, and CEO 92-12 (Question 2) in which we advised that the PSC, and not its employee, receives a gift where the employee travels to a meeting sponsored by a State or Federal agency, where the employee is reimbursed by the PSC and where the PSC seeks reimbursement from the State or Federal agency.

In addition, we would direct your attention to Sections 112.313(6) and 112.313(8), Florida Statutes, and caution you to be aware of their prohibitions against misusing your public position or using "inside information" on behalf of the corporation. Those sections provide:

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), Florida Statutes.]

For purposes of this provision, the term "corruptly" is defined as follows:

'Corruptly' means 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(9), 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.]

This question is answered accordingly.