



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Eric Somoano, Elevator Inspector
Miami-Dade Internal Services Department

FROM: Nolen Andrew Bunker, Staff Attorney
Miami-Dade County Commission on Ethics and Public Trust

SUBJECT: INQ 2023-152, Section 2-11.1(j), Conflicting employment prohibited.

DATE: November 14, 2023

CC: All COE Legal Staff; Wilfredo Medina, Elevator Selection Supervisor, Miami-Dade Internal Services Department; Nicolas Ortiz, Elevator Selection Manager, Miami-Dade Internal Services Department

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust (“Ethics Commission”) and requesting our guidance regarding possible conflicts of interest arising from the operation of your proposed private business and your County employment.¹

Facts

You are currently employed with the Miami-Dade County Internal Services Department (“ISD”) working as an Elevator Inspector. Your job duties as an Elevator Inspector primarily include regulatory inspection of elevators, escalators, moving walkways, dumbwaiters, wheelchair lifts, and other types of conveyances enforceable by the Florida Building Code, The American Society of Mechanical Engineers (“ASME”), and The National Fire Protection Association (“NFPA”). You are tasked with ensuring compliance and safety on units in both public and private buildings throughout Miami-Dade County. However, you advised that your primary focus is currently the Port of Miami, the Kaseya Center, and Harry Cain Tower. Previously, your supervisor Wilfredo Medina stated that your assignment to the enforcement/regulatory area means that you have authority and oversight over the elevator industry in Miami-Dade County, which would include Miami-Dade County buildings and private company providers.

¹ You previously requested an opinion regarding proposed outside employment with a privately owned company as an elevator inspector; that opinion concluded that such outside employment would give rise to a prohibited conflict of interest. *See* INQ 22-26.

You would like to engage in outside employment by creating and operating a private, for-profit elevator and other conveyance inspection company. You have not yet incorporated or given this proposed business a name. Your anticipated duties with your private company include owning and operating the business, as well as doing inspections and periodic tests of elevators, escalators, wheelchair lifts, dumbwaiters, and other conveyances for private entities outside of Miami-Dade County. With regard to your potential clients, you intend to contract with the owners of the buildings in which the conveyances that you will inspect are located. You do not intend to contract with the companies who install the conveyances, nor do you intend to work for any governmental entities. With regard to the companies performing the work that you would be inspecting, you stated that you would most likely be inspecting the work done by technicians working for the same companies that you currently oversee in your County role because the elevator industry is very small. However, you noted that the work would likely be done by different technicians with different supervisors from the work done in Miami-Dade County that you inspect because the assignments in these elevator installation companies are typically made geographically.

Finally, you advised that your proposed outside employment will only occur outside the hours in which you are expected to perform your County duties, and you only intend to work in places “far away from Miami-Dade County,” such as Naples, Marco Island, The Florida Keys, and Palm Beach. You further advised that your position as an elevator inspector with ISD does not give you access to any non-public information that is, or could be, relevant to your proposed outside employment. You further advised that you have your own tools and will not be using any County-issued resources or County databases for your proposed outside employment.

Issue

Whether any prohibited conflicts of interest may exist between your County employment and your proposed outside employment as owner and operator of a business that will perform inspections on elevators and other conveyances outside of Miami-Dade County.

Analysis

The Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (“County Ethics Code”) prohibits County employees from accepting outside employment, “which would impair his or her independence of judgment in the performance of his or her public duties.” Section 2-11.1(j); *see also* section 2-11.1(k). Additionally, Miami-Dade County Administrative Order 7-1 provides that, “[u]nder no circumstances shall a County employee accept outside employment . . . where a real or apparent conflict of interest with one’s official or public duties is possible.”

County employees are required to obtain approval from their department director prior to engaging in outside employment. *See* AO 7-1. Departmental directors and their subordinate supervisors may request an opinion from the Miami-Dade Commission on Ethics and Public Trust regarding any potential conflict of interest concerning the proposed outside employment. *See* INQ 21-111; INQ 19-101. Department directors and their subordinate supervisors have the discretion to deny a request for outside employment if they determine that, at any time, the proposed outside

employment would be contrary, detrimental, or adverse to the interests of the County or the employee's department. *See* RQO 16-02; RQO 00-10; INQ 13-28.

Multiple factors are considered when evaluating whether outside employment is conflicting, including similarity of duties with the employee's County duties, contact with the same or similar entities (e.g., similar personnel, clients, suppliers, or subcontractors) in both the employee's County position and proposed outside employment, overlapping work hours, use of County resources in the outside employment, and the management of County vendors who are also involved in the proposed outside employment. *See* RQO 17-01. The similarity between an employee's County duties and his or her outside employment duties does not indicate, *by itself*, the existence of a conflict of interest. *See* INQ 18-54 (citing RQO 12-07; RQO 04-168; RQO 00-10) (noting that a County employee can engage in outside employment with similar duties and functions so long as he or she abides by certain limitations). Furthermore, the use of an acquired knowledge base in outside employment for a privately owned company also does not, in and of itself, create a conflict of interest. *See* INQ 20-43 (a firefighter/emergency medical technician working for the Miami-Dade Fire Rescue Department could engage in outside employment as the Chief of the Tavernier Volunteer Fire Department).

In practice, an Elevator Contract Specialist working in the then-extant Miami-Dade Transit Department could engage in outside employment as the President of a private elevator inspection company, but he could not perform inspections on work done by vendors that he supervises in his public capacity because, if he "is evaluating work by the same companies in both capacities, then it may impair his independence of judgment in his public capacity." *See* RQO 10-01. Furthermore, the County employee could not compete in his private capacity with County vendors who he supervises in his County work. *See id.* Similarly, an Elevator Inspector for the then-extant Miami-Dade General Services Administration ("GSA") could engage in outside employment to perform consulting and routine elevator inspections for a St. Louis, Missouri, based company so long as he performed his work outside of Miami-Dade County, did not perform any inspections for elevator contractors who the GSA regulated, and did not perform any work for any elevator inspection firm and any building owner or manager who does business in Miami-Dade County. *See* INQ 05-110.

Furthermore, you previously requested an opinion regarding whether you could engage in outside employment as an elevator inspector for a private company performing elevator inspections outside of Miami-Dade County. *See* INQ 22-26. You could not engage in that proposed outside employment because that proposed employer conducted inspections in Miami-Dade County of work done by the same companies whose work you inspect in your County employment capacity, and because of "the regulatory nature of your County position, and the potential that you and your department would have regulatory authority over your outside employer." *Id.*

Here, your proposed outside employment – owning and operating a private company that conducts elevator and other conveyance inspections – would give rise to a prohibited conflict of interest under the County Ethics Code. As you acknowledge, your proposed outside employment would involve inspecting and evaluating work done by the same companies whose work you inspect in your County position. This type of overlapping interaction between a County employee's public position and his proposed outside employment gives rise to a prohibited conflict of interest

because, “[i]f the employee ‘is evaluating work by the same companies in both capacities, then it may impair his independence of judgment in his public capacity.’” INQ 22-26 (quoting RQO 10-01). Furthermore, the elevator and other conveyances industry is very small, and you are likely to come in contact with the same or similar entities over which ISD has regulatory oversight. *See* INQ 22-26; *see also* RQO 17-01 (encountering the same or similar entities is a factor contributing to a conflict of interest). Accordingly, in light of this overlap and the small size of the industry, imposing a restriction requiring that you not perform any private inspections of work done by companies subject to regulation by ISD – meaning companies who perform elevator and other conveyance installation, maintenance, and repair work in Miami-Dade County – would essentially be a restriction prohibiting you from engaging in your proposed outside employment. *See* INQ 22-26; *cf.* RQO 10-01.

While this Commission previously permitted an Elevator Contract Specialist with the then-extant County Transit Department to operate a private elevator and other conveyance inspection business, so long as he did not inspect work done by businesses subject to regulation by his employing department, your supervisor – Mr. Ortiz – has explained that ISD has far broader regulatory authority over the industry than the then-extant County Transit Department. *See* INQ 22-26. Furthermore, even if such a restriction prohibiting you from inspecting work done by companies subject to regulation by ISD was not prohibitively restrictive, our precedent would also prohibit you from performing inspections for any building owner or manager who owns elevators or other conveyances in Miami-Dade County subject to regulation or inspection by ISD because receiving payment from such entities would also give rise to an appearance of impropriety such that you would not be able to fully and faithfully execute your public duties. *See* INQ 05-110.

Finally, your proposed outside employment would involve responsibilities essentially identical to your responsibilities as a County employee, and in your proposed outside employment you would use the same knowledge base as used in your County employment. While alone those similarities are not prohibitive, when taken together with the fact that your proposed outside employment would also include interacting with the same or similar individuals as described above, the totality of the circumstances result in a prohibited conflict of interest that prevents you from engaging in your proposed outside employment. *See* INQ 22-26; *see also* INQ 20-43; INQ 18-54.

Opinion

Based on the facts presented and for the reasons discussed above, we find that **a prohibited conflict of interest would prevent you from engaging in your proposed outside employment** as the owner and operator of an elevator and other conveyance inspection company. *See* RQO 10-01; INQ 22-26; INQ 05-110. Specifically, your proposed outside employment gives rise to a prohibited conflict of interest because you would encounter the same or similar persons or entities as in your County work due to the small nature of the elevator/conveyance inspection industry, and your proposed outside employment would involve the same responsibilities and knowledge base as your County employment. *See* INQ 22-26; *see also* INQ 20-43; INQ 18-54. Accordingly, based on the totality of the circumstances, a prohibited conflict of interest would arise were you to engage in your proposed outside employment.

This opinion is based on the facts presented. If these facts change, or if there are any further questions, please contact the above-named Staff Attorney.

Other conflicts may apply based on directives from ISD or under state law. Questions regarding possible conflicts based on ISD directives should be directed to ISD or the Mayor's Office. For an opinion regarding Florida ethics law, please contact the Florida Commission on Ethics, P.O. Drawer 15709, Tallahassee, FL 32317, phone number (850) 488-7864, <http://www.ethics.state.fl.us/>.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Commission on Ethics or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.