



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Monique Spence
Administrative Officer 3
Miami-Dade County Department of Solid Waste Management

FROM: Nolen Andrew Bunker, Staff Attorney
Commission on Ethics

SUBJECT: INQ 2023-47, Section 2-11(k) Prohibition on outside employment; Section 2-11.1(j), Conflicting employment prohibited; Section 2-11.1(v), Voting Conflicts.

DATE: April 17, 2023

CC: All COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding possible ethics issues arising from your County employment, your position as President for a nonprofit organization, and your potential prospective service on a County advisory board.

Facts

You are currently employed by the Miami-Dade County Department of Solid Waste Management (“DSWM”) as an Administrative Officer 3. You work as part of DSWM’s Public Information and Outreach Division, and your responsibilities primarily include managing and facilitating public information and outreach, press and media relations, and community outreach for the Mosquito Control Division of DSWM.

The Freedom Heart Foundation Inc. (“TFHF”) is a Florida not for profit corporation. TFHF is a South Florida based, non-profit organization that promotes awareness of, and raises money to combat, domestic abuse.¹ You advised that TFHF does not contract with Miami-Dade County. A record search also indicates that TFHF is not a County vendor. You advised that you are the Founder, meaning chief executive officer, of TFHF. Corporate documents maintained by the State of Florida reflect that you are listed as the President of TFHF. With regard to your responsibilities

¹ See <https://www.iamstrongenough.org/> (last visited Apr. 10, 2023).

to TFHF, you advised that you coordinate domestic violence survivor empowerment opportunities, visit local domestic violence shelters, organize events directed to domestic violence survivors, distribute resources to domestic violence survivors, and host and speak at inspirational workshops for domestic violence survivors. In general, you advised that your time-commitment to TFHF is fluid because events primarily occur on weekends; however, you advised that it is fair to say that you dedicate a significant portion of your personal time in furtherance of TFHF and its mission. You further advised that you are primarily responsible for the operation of the organization, but that you do not collect a salary or any other type of monetary compensation for your work.

Finally, you advised that you have been invited to consider joining the Miami-Dade County Domestic Violence Oversight Board (“DVOB”). The DVOB serves the Miami-Dade County Board of County Commissioners (“BCC”) in an advisory/oversight capacity with respect to issues affecting or relating to domestic violence.² Specifically, the DVOB submits to the BCC a comprehensive plan and budget (“the Plan”) for the use of the portion of the food and beverage tax proceeds dedicated to the provision of domestic violence shelters. *See* Miami-Dade County Code § 2-893. The DVOB is further tasked with annually reviewing the Plan and recommending any needed modifications to the BCC, which only has the power to amend the Plan by a two-thirds majority vote. *Id.* Regarding the DVOB’s composition, it has fifteen (15) voting members. *See* Miami-Dade County Code § 2-892(a). The County Mayor, the Miami-Dade County State Attorney, and each of the County Commissioners appoint one member of the DVOB, with the Mayor’s appointment limited to a “member of the law enforcement community.” Miami-Dade County Code § 2-892(c). However, “[t]he voting membership of the [DVOB] shall consist of *persons who are not County employees*, with the exception of Miami-Dade Police Department [“MDPD”]] employees” Miami-Dade County Code § 2-892(b) (emphasis added).³

Issue

Whether the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (“County Ethics Code”) would impact your ability to serve on the DVOB while continuing your County employment with DSWM and/or operating your not-for-profit organization TFHF.

Analysis

As a preliminary matter, while there is no general prohibition against the appointment of a County employee to a County board, the Miami-Dade County Commission on Ethics and Public Trust (“Ethics Commission”) has generally cautioned against the practice of County board service by County employees because several provisions of the Ethics Code are implicated with such service. *See* INQ 21-51. Furthermore, when a County employee is being contemplated for appointment to

² *History*, DOMESTIC VIOLENCE OVERSIGHT BOARD, <https://www.miamidade.gov/global/government/boards/domestic-violence-oversight-board.page> (last visited Apr. 10, 2023).

³ In July 2021, the BCC adopted Miami-Dade County Ordinance No. 21-63, which amended Miami-Dade County Code Section 2-892(b) to exclude County employees, excepting MDPD employees, from appointment to the DVOB.

a County Board, the Ethics Commission has recommended that it be consulted for an ethics opinion prior to appointment. *See* INQ 21-51; INQ 16-03.

Here, while the Ethics Commission has no authority to provide authoritative interpretations of the Miami-Dade County Code beyond those specifically provided for by Section 2-1068 of the Miami-Dade County Code, it appears that you would not be eligible for appointment to the DVOB because you are currently employed by DSWM. *See* Miami-Dade County Code § 2-892(b).⁴ Nevertheless, this inquiry involves several sections of the County Ethics Code, each of which is analyzed below, and for purposes of this opinion, it will otherwise be assumed that you are eligible for appointment to the DVOB.

A. Section 2-11.1(k) – Prohibition on Outside Employment

The County Ethics Code provides that, “[a]ll full-time County and municipal employees engaged in any outside employment . . . shall file, under oath, an annual report indicating the source of the outside employment . . .” County Ethics Code § 2-11.1(k)(2). Outside employment is considered “any non-County employment or business relationship in which the County employee provides a personal service to the non-County employer that is compensated or customarily compensated.” RQO 17-03. Generally, uncompensated outside employment for a traditional nonprofit entity is not considered outside employment. *Id.* However, a County employee who has “significant managerial responsibilities or working time commitments” with a nonprofit entity could be considered to be engaging in outside employment. *Id.*

Multiple factors are considered when determining whether service with a non-profit is considered outside employment, including: (a) whether the person founded the non-profit; (b) whether the person serves as the non-profit’s Executive Director or President, or in some other office; (c) whether the person is responsible for the non-profit’s day-to-day functioning or activities; (d) whether the person receives any form of compensation for his or her service to the non-profit; and, (e) whether the person has significant time commitments as part of his or her service to the non-profit. *See* INQ 22-44; *see also* RQO 17-03.

⁴ Miami-Dade County Code § 2-892(b) provides:

The voting membership of the board shall consist of persons who are not County employees, with the exception of Miami-Dade Police Department employees, shall be ethnically, racially and gender balanced and shall be composed of at least one person from each of (1) Providers of services to domestic violence victims, including but not limited to a representative of Safe Space Shelter, Inc.; (2) Domestic violence victim advocates; (3) Members of the judiciary, preferably a full-time, sitting domestic violence judge or a former or acting administrative judge of the domestic violence court; (4) Concerned citizens (at-large); (5) Victims of domestic violence; (6) Representatives of impacted jurisdictions; and (7) A representative of the Public Health Trust.

If you would like an authoritative interpretation of Miami-Dade County Code Section 2-892, please contact the Miami-Dade County Attorney’s Office.

The Ethics Commission has opined that County employees who establish a nonprofit and serve as its Executive Director, President, or Manager, whether compensated or not, are engaged in outside employment. *See* RQO 17-03; *see also* INQ 13-08 (a County employee who served as the executive director of an after-school tutoring and basketball instruction nonprofit organization was engaged in outside employment because the type of services that he provided are “*customarily eligible to be compensated.*” [emphasis in original]). Similarly, a County employee who founded a nonprofit for victims of domestic violence and human trafficking who spent in excess of twenty hours per week administering the day-to-day functioning of the nonprofit was engaged in outside employment. *See* INQ 17-107.

Here, it is evident that concurrent employment by DSWM and appointment to the DVOB would constitute outside employment. *See* INQ 21-51. Furthermore, based on the facts presented and discussed above, it appears that **your service as Founder of TFHF also constitutes outside employment** because: (a) you founded TFHF; (b) you serve in an executive capacity for TFHF, with the documents filed with the State of Florida indicating that you are its President; (c) you are responsible for TFHF’s regular operations and activities; and (d) you commit a significant portion of your personal time to TFHF. *See* RQO 17-03; INQ 22-44; INQ 17-107. The only factor that cuts against considering your ongoing service as Founder of TFHF as outside employment is the fact that your work is uncompensated. However, because you otherwise operate TFHF in an executive capacity and spend a significant amount of time doing so, the other factors outweigh the uncompensated nature of your work. *See* INQ 17-107; INQ 13-08.

B. Section 2-11.1(j) – Conflicting Employment Prohibited

The Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (“County Ethics Code”) provides that no person who is considered a County employee and/or advisory personnel “shall accept other employment which would impair his or her independence of judgment in the performance of his or her public duties.” *See* County Ethics Code § 2-11.1(j).

Outside employment is more likely to conflict with County employment “when the two pursuits overlap or are closely related.” INQ 16-89 (citing RQO 12-11, INQ 12-159). However, “a 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.” INQ 22-07; *see also* INQ 18-54 (citing RQO 12-07; RQO 04-168; RQO 00-10) (concluding that outside employment with similar duties and functions can avoid conflict when abiding by certain limitations).

With regard to County employees serving on a County advisory board, an employee of the Miami-Dade County Community Action and Human Services Department (“CAHSD”) had a prohibited conflict of interest that prevented her from serving as a member of the DVOB because the DVOB’s advisory role to the BCC directly impacted CAHSD’s operations and funding due to CAHSD’s responsibilities related to management and oversight of domestic violence programs, shelter, and transitional housing operations. *See* INQ 21-51. In contrast, an employee of the Miami-Dade County Parks, Recreation and Open Spaces Department (“PROS”) could also serve as a member of the Citizens’ Independent Transportation Trust (“CITT”) and as the uncompensated Vice-President of the Everglades Bicycle Club (“EBC”) without giving rise to a prohibited conflict of

interest because there was no overlap in duties that appeared to affect her independence of judgment in any of her three positions. *See* INQ 21-13.

Here, addressing possible conflicts related to your employment as an Administrative Officer 3 with DSWM, based on the information provided to us at this time it appears to be unlikely that your outside employment as the Founder of TFHF would give rise to a prohibited conflict of interest because there is no overlap between your public duties and your outside employment: your outside employment is performed outside of your County hours; you will not come into contact with the same persons or entities involved in your County work; you will not use the same resources in your outside employment as used in your County work; you will not have access to non-public information as part of your County employment that is, or could be, relevant to your outside employment as the Founder of TFHF; and TFHF is not a County vendor and has no business related to DSWM. *See* RQO 17-01 (discussing multiple factors to consider when evaluating whether outside employment is conflicting); INQ 21-13. Similarly, your employment as an Administrative Officer 3 with DSWM would appear unlikely to give rise to a prohibited conflict of interest in relation to your potential future appointment to the DVOB because there is no overlap between your DSWM duties and your potential responsibilities to the DVOB. However, if DVOB meetings occurred during the regular business hours that you would otherwise be expected to work at DSWM, you would be required to take annual leave from your DSWM position in order to avoid any potential conflict. *See* INQ 22-97; INQ 18-222.

Addressing possible conflicts between your potential position as a DVOB board member and your outside employment as Founder of TFHF, based on the information provided to us at this time, it appears that there is no overlap between your potential public duties and your outside employment that would compromise your ability to exercise independence of judgment in the execution of your potential County duties. Your outside employment is performed outside of your potential County hours with the DVOB; you will come into contact with the same or similar persons, but only in the context of furthering the mission of the DVOB by increasing access to services for survivors of domestic violence; you will not use the same resources in your outside employment as used in your potential County position with DVOB because TFHF does not do business with the County or seek County grant funds; and, you will not have access to non-public information as part of your potential County employment that is, or could be, relevant to your outside employment as the Founder of TFHF. *See* INQ 22-07; INQ 09-112 (employee of Miami-Dade Public Library System may serve on the Board of Trustees of the Friends of the Miami-Dade Public Library, Inc., a non-profit organization founded to further the mission of the public library system, without giving rise to a prohibited conflict of interest).

However, County 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* AO 7-1; RQO 16-02; RQO 00-10; INQ 13-28. **Accordingly, this memorandum does not grant permission to engage in outside employment. You must obtain permission to engage in outside employment annually from your department director.**

C. Section 2-11.1(v) – Voting Conflicts

The County Ethics Code provides that no person who is considered County advisory personnel:

shall vote on any matter presented to an advisory board . . . on which the person sits if the board member will be directly affected by the action of the board on which the member serves, and the board member has any of the following relationships with any of the persons or entities appearing before the board: (i) officer, director, partner, of counsel, consultant, employee, fiduciary, or beneficiary; or (ii) stockholder, bondholder, debtor or creditor.

County Ethics Code § 2-11.1(v). Accordingly, for a voting conflict to exist under Section 2-11.1(v) of the County Ethics Code, both prongs must be met. *See* RQO 07-49; INQ 20-73.

In practice, a member of the then-extant Vizcaya Museum and Gardens Trust – the County governing board for Vizcaya – who also served as the President of the Vizcayans – a non-profit organization whose purpose was to provide financial support for the preservation and operation of Vizcaya – could serve in both positions and vote on matters concerning the Vizcayans as a member of the Vizcaya Trust without giving rise to a prohibited conflict of interest because he would not personally benefit from any decision of the Vizcaya Trust. *See* RQO 07-42. Similarly, a member of the Library Advisory Board (“LAB”), a County advisory board, could serve as an unpaid volunteer member of the Board of Trustees of the Friends of the Miami-Dade Public Library, Inc., (“Friends”) and vote on matters related to Friends that came before the LAB, so long as she did not have any role in preparing the Friends matters presented to the LAB, because the LAB member would not otherwise be directly affected or benefitted from a LAB decision in favor of Friends. *See* INQ 22-152.

Here, as the Founder of TFHF, you will have a designated relationship with TFHF – officer and/or director. However, you advised that your position with TFHF is uncompensated, meaning you will not be directly affected by an action of the DVOB related to TFHF. As a result, it does not appear that you would have a prohibited voting conflict of interest under Section 2-11.1(v) of the County Ethics Code. *See* RQO 07-42; INQ 22-152. Nevertheless, given the particularly powerful and sensitive nature of the DVOB and its work, there may be an appearance of impropriety in a given situation that would justify recusal from a particular vote. *See* INQ 21-51 (noting DVOB’s significant responsibilities and limitations on the BCC’s ability to make changes to the Plan). However, outside of the County procurement process, the Ethics Commission generally does not opine on appearances of impropriety and defers to the particular board member to determine the appropriate course of action in a given situation. *See* INQ 09-29 (finding no prohibited voting conflict of interest under Section 2-11.1(v) of the County Ethics Code and otherwise deferring to the DVOB member regarding appearances). Accordingly, while you advised that TFHF does not have any business before the DVOB and TFHF is not a County vendor, **if you are appointed to the DVOB and a matter involving or impacting TFHF comes before the DVOB, you are strongly encouraged to consider whether there may be an appearance of impropriety and whether recusal may be appropriate in those circumstances.**

Opinion

Based on the facts presented here and discussed above, you are engaged in outside employment, as that term is used in the County Ethics Code, by serving as Founder/President for TFHF, and because you are a full-time County employee, **you must annually report your activities as outside employment by July 1st of each year as required by Section 2-11.1(k)(2) of the County Ethics Code.**⁵ Your outside employment as Founder of TFHF would not give rise to a prohibited conflict of interest with regard to your County position as an Administrative Officer 3 or your potential position as a member of the DVOB. *See* INQ 22-97; INQ 22-07; INQ 18-222. Furthermore, **while it appears you are not eligible to serve on the DVOB**, if you are appointed to the DVOB and a matter concerning TFHF comes before the DVOB, you would not have a prohibited voting conflict of interest, but you are strongly encouraged to consider whether there may be an appearance of impropriety and whether recusal may be appropriate in those circumstances. *See* RQO 07-42; INQ 22-152.

However, in addition to the restrictions discussed above, several sections of the County Ethics Code are worth review:

- You may not appear before any County board or agency to make a presentation on behalf of or seek any benefit for TFHF, including the DVOB. *See* County Ethics Code § 2-11.1(m)(1).
- With respect to fundraising on behalf of TFHF, the County Ethics Code prohibits County employees from soliciting any gifts in exchange for an official action. *See* County Ethics Code § 2-11.1(e)(3). This means that you may not solicit or accept a gift on behalf of TFHF in exchange for any official action you may take. However, in general the solicitation of gifts on behalf of a nonprofit organization is not prohibited, particularly where, as here, the County employee is not compensated by the non-profit. *See* INQ 16-93. Nevertheless, you must avoid direct, targeted solicitations of County vendors and lobbyists on behalf of TFHF in order to avoid situations where the County vendor or contractor may perceive its agreement to a request for a contribution as in exchange for its continued business relationship with the County. *See* INQ 22-43; INQ 16-275.
- You may not exploit your County position to secure special privileges or exemptions for yourself and/or TFHF. *See* County Ethics Code § 2-11.1(g).
- You may not disclose and/or use any confidential and/or proprietary information acquired because of your County employment and/or position to derive a personal benefit, or for the benefit of TFHF. *See* County Ethics Code § 2-11.1(h).

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.

⁵ You can find the required form online at: <https://www.miamidade.gov/elections/library/forms/outside-employment-statement.pdf>.

Other conflicts may apply based on directives from DSWM, DVOB, or under state law. Questions regarding possible conflicts based on DSWM or DVOB directives should be directed to DSWM or DVOB respectively, or to 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.