

FILE 2772 — February 5, 2021

CONFLICT OF INTEREST

CITY POLICE OFFICER RECEIVING RENT REDUCTION IN EXCHANGE FOR PROVIDING SECURITY SERVICES

To: *Stephen K. Aldrich, Chief of Police (City of Holly Hill)*

SUMMARY:

A police officer's acceptance of an offer from a landlord of an apartment complex, exchanging a reduction in rent for part-time, off-duty work as a Courtesy Officer, will not be prohibited by Sections 112.313(2), 112.313(4), or 112.313(7)(a), Florida Statutes. Also, the acceptance of the rent reduction is not indicative of the wrongful intent required to show a violation of Section 112.313(6) or Article II, Section 8(h)(2), Florida Constitution. CEO 78-29, CEO 78-29, CEO 79-81, CEO 83-75, CEO 91-52, CEO 92-48, CEO 94-19, CEO 94-36, CEO 03-15, and CEO 19-23 are referenced.

QUESTION:

Does the Code of Ethics for Public Officers and Employees or the Sunshine Amendment operate to prohibit a police officer from accepting a reduction in rent in exchange for providing part-time, off-duty services as a Courtesy Officer for the apartment complex offering the rent reduction?

Under the circumstances presented, this question is answered in the negative.

In your written inquiry, you explain that an apartment complex within the City limits has requested to have a police officer reside on its premises and serve as the apartment complex's Courtesy Officer when off duty. The inquiry states that a Courtesy Officer has some functions similar to a security officer, reporting crime matters to the on-duty police officers and performing minimal documentation of quality-of-life issues of the residents within the apartment complex. The inquiry relates that the City Police Department requires its officers to disclose in-kind reductions of rent on federal income tax filings. With this background, you ask whether a City Police Officer may accept rent reductions from an apartment complex in exchange for serving as a Courtesy Officer.

In reviewing whether such an arrangement is a conflict of interest, analysis under Section 112.313(7)(a), Florida Statutes, is required. Section 112.313(7)(a) states:

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.

The first clause of this statute prohibits a public officer or employee from having employment or a contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second clause of this statute prohibits a public officer or employee from having employment or a contractual relationship that would create a continuing or frequently recurring conflict of interest or that would create an impediment to the full and faithful discharge of his or her public duties.

When considering the first and second clauses of Section 112.313(7)(a), the Commission on Ethics has consistently found that there is nothing inherently conflicting about a police officer

(or other similar public officer) accepting off-duty work as a security guard with an entity that is not regulated by or doing business with the police officer's agency. See CEO 77-79 (police officer working as a security guard when off duty); CEO 78-29 (police officer working as a security director for a corporation located in the same municipality when off duty); CEO 79-81 (highway patrol trooper working to provide private escort services to trucks with oversized loads); and CEO 92-48 (FDOT motor carrier compliance officers working for private transportation construction contractors in a role that protects roadside equipment and facilitates traffic control the safety of road crew personnel, when off duty).

More similar to the scenario you propose, we have found in the past that no conflict of interest is created when a law enforcement officer barter for rent-free or rent-reduced arrangements in exchange for their work as a security officer. See CEO 94-19 (police officer receiving rent reduction in exchange for off-duty work as a security officer) and CEO 03-15 (deputy sheriff working during off-duty hours as security at a private campground in exchange for a free-of-charge stay at a camp site).

Given these numerous and consistent past opinions, we find that no conflict of interest inherently arises under either the first or second clause of Section 112.313(7)(a) when a police officer, in an arm's-length agreement with a private landlord, accepts a total or partial reduction in rent in exchange for the performance of duties as a Courtesy Officer.

Further, because the police officer under the facts presented will be accepting a reduction in rent, which is no doubt a thing of value, analysis under Sections 112.313(2) and 112.313(4), Florida Statutes, is appropriate, too. Section 112.313(2), states:

No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or

judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

Section 112.313(4), states:

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 in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.

Section 112.313(2) prohibits a public officer or employee, among others, from soliciting or accepting anything of value when there is an understanding that the solicitation or acceptance would influence an official action of the public officer or employee. Section 112.313(4) prohibits one from accepting anything of value that he or she knows or should know is offered to influence his or her official action.

There is no indication in the facts presented that any police officer in your department has solicited a reduction in rent from the apartment complex. There also is no indication from the facts that any police officer's acceptance of the reduction in rent would have any bearing on any official action he or she might take. In fact, as we noted in CEO 94-19, the bartered-for exchange of the rent reduction for labor as a Courtesy Officer "mitigates against the arrangement being viewed as attempts to influence the official conduct of the police officers." The preference of a landlord for having a police officer as a tenant at an apartment complex, without also attempting to influence the police officer's official conduct, is not an improper motive for offering the free or reduced-rate rent under Sections 112.313(2) and 112.313(4). See CEO 83-75 and CEO 94-19. So long as there is no express or implied attempt to persuade the police officer to take an official action as part of the arrangement for reduced rent, there is no indication that Sections 112.313(2) and 112.313(4) will be implicated.

Lastly, it is appropriate to analyze the proposed arrangement for reduced rent through the lens of Florida's "misuse of position" prohibition found in Section 112.313(6), Florida Statutes, and also the "abuse to obtain a disproportionate benefit" prohibition found in Article II, Section 8(h)(2), Florida Constitution. Section 112.313(6) states:

No public officer [or] employee of an agency . . . shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others

"Corruptly" is defined in Section 112.312(9), Florida Statutes, to mean that an action is "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 or her public duties."

Essentially, Section 112.313(6) prohibits public officers and employees from corruptly using or attempting to use their official positions or property or resources placed within their trust due to their public employment, and it prohibits them from performing their official duties wrongfully and in a manner inconsistent with the proper performance of their public duties so they may secure a special privilege, benefit, or exemption for themselves or another.

Similarly, Article II, Section 8(h)(2), Florida Constitution states:

A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

The Commission on Ethics did indeed engage in rulemaking to define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation. The rule defines a

disproportionate benefit as "a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties." Rule 34-18.001(2)(a), F.A.C. The rule also specifies that the requisite intent necessary for finding a violation of the disproportionate benefit prohibition is "that the public officer or public employee acted, or refrained from acting, with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties." Rule 34-18.001(4). In CEO 19-23, we expounded on the intent requirement of the Constitutional amendment, noting that it is "highly similar, if not identical," to the intent required to show a violation of Section 112.313(6) because both the rule and the amendment "require an act or omission committed with a 'wrongful intent' and for the purpose of obtaining a result 'inconsistent with the proper performance' of one's public duties." CEO 19-23.

In the context of the opinion process and in the absence of a thorough engagement in fact finding (e.g., as in a complaint or referral investigation), we are unable to determine definitively whether a particular police officer in your department, in a particular context, would have the requisite wrongful intent necessary to implicate the "misuse of position" statute and the "abuse to obtain a disproportionate benefit" Constitutional provision. See CEO 91-52 and CEO 94-36. We can, however, speak generally about the intent element and we can expound on whether the benefit is disproportionate, in order to provide advice and guidance.

Where Rule 34-18.001(2), F.A.C., speaks to the wrongful intent that must be demonstrated to show a violation of the Constitutional provision, Rule 34-18.001(3), F.A.C., speaks to the methodology for determining whether a particular benefit is disproportionate. Those factors are:

- (a) The number of persons, besides the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, who will experience the benefit, privilege, exemption, or result;
- (b) The nature of the interests involved;
- (c) The degree to which the interests of all those who will experience the benefit, privilege, exemption, or result are affected;
- (d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others who will receive a benefit, privilege, exemption, or result;
- (e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege, exemption, or result, and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered; and
- (f) The degree to which the benefit, privilege, exemption, or result is not available to similarly situated persons. As used in this chapter, "similarly situated persons" means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment, or a commonality or like characteristic to the public officer's or public employee's spouse, children, or employer, or to any business with which the public officer or public employee contracts, serves as an officer, partner, director, or proprietor, or in which he or she owns an interest.

Rule 34-18.001(3)(a-f), F.A.C.

In the instance where a police officer receives a rent reduction, or even a rent reduction in exchange for part-time work, where the arrangement is not available to otherwise similarly-situated potential tenants in the general public, we find that the benefit is disproportionate.

Though a public officer may receive a benefit, and though that benefit may indeed be disproportionate to that which would be available to the public at large, that is not automatically indicative of an abuse or a wrongful intent. To the contrary, we find that an arm's-length agreement for reduced rent in exchange for part-time work generally is not, in and of itself, a demonstration of a wrongful intent to obtain that benefit in a manner that is inconsistent with the proper performance of one's duties. We also note that a landlord's preference for police officer

tenants is not evidence of a police officer's state of mind. Without the presence of some other fact indicating a wrongful intent on the part of the police officer, violations of Section 112.313(6) and Article II, Section 8(h)(2), Florida Constitution, are not indicated.

In conclusion, Sections 112.313(2), (4), and (7) will not pose a barrier to a police officer accepting a rent reduction in exchange for part-time work as a Courtesy Officer, as described in your inquiry. Assuming there are no facts in a particular officer-apartment complex situation indicating that the police officer has a wrongful intent to obtain a result that is inconsistent with the proper performance of his or her duties, Section 112.313(6) and Article II, Section 8(h)(2), Florida Constitution also will not be implicated.

Your question is answered accordingly.

XXX/sjz/ks

cc: Chief Stephen K. Aldrich